Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Tamara Brown,	)	Date: June 4, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-139
	)	Decision No. CR1799
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 Petitioner *pro se* Tamara Brown from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G. relies on the terms of section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). I grant the I.G.'s Motion for Summary Affirmance.

I. Procedural Background

Petitioner *pro se* Tamara Brown was a Licensed Practical Nurse and Medicaid provider in the State of Ohio between November 2005 and July 2006. On August 15, 2006, Petitioner was indicted by the Special Grand Jury sitting for the Court of Common Pleas, Franklin County, Ohio, and charged with one count of Medicaid Fraud, in violation of OHIO REV. CODE § 2913.40(B). That offense is classified as a fourth-degree felony based on the amount of Petitioner's claims for Medicaid services purportedly provided by her.

Petitioner appeared with counsel in the Court of Common Pleas, Franklin County, Ohio, on March 20, 2007, and pleaded guilty to the stipulated lesser included offense of Attempted Medicaid Fraud, a first-degree misdemeanor offense. She was sentenced on the same day to a fine of $100.00 and the payment of her prosecution's costs.

Section 1128(a)(1) of the Act mandates the exclusion 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" for a period of not less than five years. On September 28, 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 *pro se*, Petitioner timely sought review of the I.G.'s action by letter dated July 24, 2007. I convened a telephonic prehearing conference on January 28, 2008, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing those issues. The parties agreed that the case likely could be decided on written submissions, and by Order of February 5, 2008, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case closed on May 19, 2008. All proffered exhibits are admitted to the evidentiary record on which I decide this case. Throughout these proceedings, Petitioner has continued to act *pro se*.

II. Issues

The legal issues before me are set out at 42 C.F.R. § 1001.2007(a)(1). 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.

As I shall explain below, both issues must be resolved in favor of the I.G.'s position.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the 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.

Attempts to commit criminal offenses are forbidden by OHIO REV. CODE § 2923.02(a), which declares that:

> (a)No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

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 accepted plea of guilty on March 20, 2007, in the Court of Common Pleas, Franklin County, Ohio, Petitioner Tamara Brown was found guilty of the first-degree misdemeanor offense of Attempted Medicaid Fraud, in violation of OHIO REV. CODE §§ 2913.40(B) and 2923.02(a). Inspector General Exhibit (I.G. Ex.) 2; Petitioner Exhibit (P. Ex.) 1.

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

3. 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 Finding 1, and the delivery of an item or service under a State health care program. I.G. Exs. 2, 3; P. Ex. 1; *Berton Siegel, D.O.,* DAB No. 1467 (1994).

4. 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, to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

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

6. There are no disputed issues of material fact and summary disposition is warranted 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 that she has been convicted, and the fact of her misdemeanor conviction is clear: I.G. Ex. 1 shows that on March 20, 2007 Petitioner appeared with counsel in the Court of Common Pleas and pleaded guilty to the crime of Attempted Medicaid Fraud, a first-degree misdemeanor. The trial court's acceptance of that guilty plea and its finding of Petitioner's guilt are explicit in the Entry reflecting the proceedings, and are underscored by the fact that the trial court proceeded immediately to the imposition of sentence. I.G. Ex. 1. Those procedural steps satisfy the definition of "conviction" set out at section 1128(a)(1) of the Act. The I.G. has proven the first essential element.

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). It is of no significance whatsoever that Petitioner's conviction was for *Attempted* Medicaid Fraud, as distinct from the completed offense of Medicaid Fraud. The plain rule is that an attempt to commit a program-related offense is the "necessary precursor to and part of " a completed offense and is a sufficient predicate for exclusion. *Kenneth M. Behr*, DAB No. 1997 (2005); *Yvette Greaves*, DAB CR1403 (2006); *Sheila Mauney*, DAB CR31 (1989).

I find that the Indictment and the Entry of proceedings on March 20, 2007, especially when read in the context of OHIO REV. CODE §§ 2913(E) and 2923.02(a), 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 attempting to violate 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 (2006). The I.G. has proved the second essential element.

Petitioner's first defense to the exclusion is based on her assertion that at the time of her plea and conviction she was unaware that the conviction could result in the imposition of the exclusion sanction. P. Ans. Br. at 1. Whether her assertion is true or not is

immaterial, for assuming, *arguendo,* her ignorance of the mandatory operation of section 1128(a) of the Act when she tendered her plea, her ignorance would neither invalidate the conviction nor bar the exclusion. *Charmaine Sue Moon*, DAB CR1769 (2008); *Marietje Kindangen*, DAB CR1765 (2008); *Timothy Wayne Hensley*, DAB CR1415 (2006); *Stella Remedies Lively*, DAB CR1369 (2005); *Steven Caplan, R.Ph.*, DAB CR1112 (2003), *aff'd, Steven Caplan v. Tommy G. Thompson*, Civ. No. 04-00251 (D. Hawaii, Dec. 17, 2004).

Her second defense asserts that the I.G. was misled into believing that her conviction was of a felony, and not a misdemeanor. P. Ans. Br. at 1. There is no evidence to support that suggestion, nor does it appear that the I.G. was under any such misapprehension, but the plain language of section 1128(a)(1) makes no distinction 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).

A dispute over her payment of costs and the fine included in her sentence is the basis of Petitioner's third defense. P. Ans. Br. at 2. Her argument is unclear, but it does not alter the fact of her conviction. Even assuming that the amount of costs and fine were related to the amount of loss to Ohio's Medicaid program, that amount would not be relevant to these proceedings, since the I.G. has not attempted to enhance Petitioner's period of exclusion by invoking the aggravating factors set out at 42 C.F.R. §§ 1001.102(b)(1) and 102(b)(7).[1]

Petitioner argues an additional point related to her conviction of a misdemeanor offense: she asserts that the "discretionary exclusion" provisions of section 1128(b)(1)(a) of the Act, 42 U.S.C. § 1320a-7(b)(1)(a), should control her situation. By that argument Petitioner seeks to avoid the mandatory effect of section 1128(a)(1). *See* Petitioner's notes on P. Ex. 8. But once a conviction is shown to be within the reach 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 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

[1]Nor has the I.G. sought to enhance the period of Petitioner's exclusion by reliance on the aggravating factor listed at 42 C.F.R. § 1001.102(b)(9), evidence concerning which aggravating factor was submitted by Petitioner herself, in P. Exs. 9, 10, 11.

and mandatory minimum period prescribed by section 1128(a)(1) must be imposed. The I.G. may not choose to proceed under an alternative statute. *Stacy Ann Battle, D.D.S.,* DAB No. 1843 (2002); *Tarvinder Singh, D.D.S.*, DAB No. 1752 (2000); *Lorna Fay Gardner*, 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.

Petitioner challenges the proposed period of exclusion as "harsh, cruel, and unusual punishment." P. Ans. Br. at 3. 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). *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 particularly fitting when settled law can be applied to undisputed material facts. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992). 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 and unambiguous. They support summary disposition as a matter of settled law. This Decision issues accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and is, GRANTED. The I.G.'s exclusion of Petitioner Tamara Brown 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