

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Benny Nathaniel Howard, III,	)	Date: July 15, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-149
	)	Decision No. CR1811
The Inspector General.	)	
_____	)	

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Benny Nathaniel Howard III (Petitioner) from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. I find that the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(1) of the Social Security Act (Act), and the five-year exclusion imposed by the I.G. is the minimum mandatory period of exclusion under the Act. Act, section 1128(a)(1).

**I. BACKGROUND**

Petitioner works as a behavioral analyst for Behavior Services of Tennessee (BSTN). I.G. Brief (Br.) at 3. Petitioner was paid by BSTN with TennCare funds received by the Tennessee Department of Mental Retardation Services. TennCare is the state Medicaid program in Tennessee. *Id.* Petitioner was charged with billing BSTN for services that were not provided to a TennCare beneficiary and with forging the name of the beneficiary's mother on the patient notes for those services. *Id.* On March 19, 2007, Petitioner pled guilty to both charges. I.G. Exhibit (Ex.) 2.

The I.G. notified Petitioner by letter dated September 28, 2007 of his exclusion from participation in Medicare, Medicaid, and all other federal health care programs for a mandatory five-year period pursuant to section 1128(a)(1) of the Act. I.G. Ex. 1. By letter dated November 26, 2007, Petitioner timely appealed the I.G.'s decision. In his request for hearing, Petitioner claimed that he was not convicted of any criminal offense

and therefore could not be excluded. The case was assigned to me for hearing and decision. On February 28, 2008, I convened a prehearing telephone conference with counsel for Petitioner, Charles S. Mitchell, Esq., and counsel for the I.G., Michael Henry, Esq. and Christina McGarvey, Esq.

During the call, I informed the parties that my jurisdiction was limited in this case to a determination as to whether the I.G. had the legal authority to exclude Petitioner and whether the exclusion period was reasonable. I also informed the parties that they had the option of waiving the right to an oral hearing and proceeding to a decision based on the briefs and documentary evidence. The parties agreed to waive the right to an oral hearing and I established a briefing schedule. See order dated March 4, 2008.

On March 27, 2008, the I.G. submitted its initial brief along with four proposed exhibits (I.G. Exs. 1-4). In my March 4th briefing Order, Petitioner was given until April 30, 2008 to file a response and proposed exhibits. Petitioner did not file a brief in response or submit proposed exhibits. On May 15, 2008, I issued Petitioner an Order to show cause why the case should not be dismissed for abandonment pursuant to 42 C.F.R. § 1005.2(e)(3). To date, Petitioner has responded to neither the March 4th briefing Order nor the May 15th Order to show cause.

Pursuant to 42 C.F.R. § 1005.14, an Administrative Law Judge (ALJ) has the authority to sanction any person, including any party or attorney, who fails to comply with an order or procedure. Those sanctions can include a dismissal of the action or decision by default against the party who fails to comply. 42 C.F.R. §§ 1005.14 (a)(5) and (6). Given Petitioner's failure to respond to any of my directives, I have only the brief submitted by the I.G. on which to decide the case and thus enter a default decision against Petitioner. I admit I.G. Exs. 1-4 into evidence.

## **II. CONTROLLING STATUTES AND REGULATIONS**

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services (Secretary) to exclude from participation in Medicare, Medicaid, and all other federal health care programs, any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs. 42 U.S.C. § 1320a-7(a)(1).

An exclusion imposed under section 1128(a)(1) must be for a period of at least five years. Act, section 1128(c)(3)(B); 42 U.S.C. § 1320a-7(c)(3)(B). Pursuant to 42 C.F.R. § 1001.102(b), no exclusion pursuant to section 1128(a)(1) may be for less than five years.

An individual is “convicted” of a criminal offense within the meaning of section 1128(i) of the Act –

- (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court . . . .
- (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court; [or]
- (3) when a plea of guilty or *nolo contendere* by the individual or entity has been accepted by a Federal, State, or local court . . . .

Act, section 1128(i); 42 U.S.C. § 1320a-7(i).

42 C.F.R. § 1001.2007(a)(1)(i) grants an ALJ the authority to address whether a legal basis for the imposition of an I.G. sanction exists.

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

#### **A. Issues**

Whether the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(1) of the Act; and,

Whether the five-year period of exclusion is reasonable.

#### **B. Findings and Discussion**

##### ***1. Petitioner was convicted within the meaning of section 1128(i) of the Act.***

An exclusion under section 1128(a)(1) of the Act requires a showing of two elements: (1) that the individual or entity has been convicted of a criminal offense as defined in section 1128(i) of the Act; and (2) that the criminal offense be related to the delivery of an item or service under title XVIII or under any state health care program. The I.G. bears the burden of persuasion to prove, by a preponderance of the evidence, that both elements have been met. 42 C.F.R. §§ 1005.15(b) and (d).

It is undisputed that, on March 19, 2007, Petitioner pled guilty to TennCare fraud and forgery in the Criminal Court of Shelby County, Tennessee. I.G. Ex. 2, at 3. The Court accepted Petitioner’s plea and sentenced him to three years probation for TennCare fraud

and one year probation for forgery, to be served concurrently. *Id.* at 2. Petitioner was granted judicial diversion for the three years of probation and ordered to perform 200 hours of community service. *Id.* Additionally, Petitioner was ordered to pay a \$500 court fine and \$13,023 in restitution to TennCare. I.G. Ex. 2, at 1.

Under section 1128(i) of the Act, an individual is “convicted” when a guilty plea is accepted by a Federal, State, or local court. Petitioner’s guilty plea was accepted by the Criminal Court of Shelby County. I.G. Ex. 2. Further, Petitioner’s deferred adjudication falls within the definition of “conviction” under section 1128(i)(4) of the Act. Therefore, I find that Petitioner was convicted within the meaning of section 1128(i) of the Act.

***2. Petitioner’s conviction was related to the delivery of an item or service under a Medicare or State health care program.***

The I.G. asserts, and I concur, that Petitioner’s conviction was related to the delivery of service under a State health care program. TennCare is the state Medicaid program in Tennessee. I.G. Br. at 2. Petitioner pled guilty to, and was convicted of, “unlawfully and knowingly” obtaining medical assistance benefits to which he was not entitled, and “unlawfully and knowingly” making a writing “with the intent to defraud the State of Tennessee’s Division of Mental Retardation Services” and/or BSTN. I.G. Ex. 4, at 4, 7. Because Petitioner pled guilty to both TennCare fraud and forgery of TennCare beneficiary records, his conviction clearly meets this second requirement.

***3. Petitioner’s exclusion for a mandatory minimum period of five years is reasonable as a matter of law.***

An exclusion under section 1128(a)(1) of the Act must be for a minimum mandatory period of five years, as set forth in section 1128(c)(3)(B) of the Act:

Subject to subparagraph (G), in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . . .

When the I.G. imposes an exclusion for the mandatory five-year period, the reasonableness of the length of the exclusion is not an issue and therefore reasonable as a matter of law. 42 C.F.R. § 1001.2007(a)(2). The I.G., the Secretary and I have no authority to reduce the five-year minimum exclusion dictated by the Act.

**IV. CONCLUSION**

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner be excluded from Medicare, Medicaid, and all federal health care programs, for a minimum mandatory period of five years because of his conviction of a criminal offense related to the delivery of an item or service under a State health program. I therefore sustain the I.G.'s exclusion of Petitioner from program participation for the mandatory period of five years.

/s/

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Alfonso J. Montano  
Administrative Law Judge