Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Edna Copp,	DATE: June 11, 1993
Petitioner,	Docket No. C-93-044 Decision No. CR271
- v. -	
The Inspector General.	

DECISION

On January 12, 1993, the Inspector General (I.G.) notified Petitioner that she was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.[1] The I.G. told Petitioner that she was being excluded under section 1128(a)(1) of the Social Security Act (Act), based on her conviction of a criminal offense related to the delivery of an item or service under the Texas Medicaid program. The I.G. told Petitioner that she was being excluded for the minimum period required by section 1128(a)(1) of the Act.

The case was assigned originally to Administrative Law Judge Joseph K. Riotto for a hearing and a decision. He held a prehearing conference at which Petitioner did not dispute that she had been convicted of a criminal offense within the meaning of section 1128(i) of the Act. However, she did not agree that the I.G. had authority to exclude her pursuant to section 1128(a)(1) of the Act. The I.G. requested the opportunity to file a motion for summary disposition, and Judge Riotto established a schedule for the I.G.'s motion, for a response by Petitioner, and for a reply by the I.G. Subsequently, the case was assigned to me.

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[1] Unless the context indicates otherwise, I use the term "Medicaid" hereafter to represent all programs other than Medicare from which Petitioner was excluded.

The I.G. filed a motion for summary disposition which Petitioner opposed. Petitioner did not dispute any of the facts asserted by the I.G. but argued that the I.G. nonetheless lacked authority to exclude her. I have carefully considered the undisputed material facts of this case, the parties' arguments, and applicable law. I conclude that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act, and the I.G. was required to exclude her for at least five years. Therefore, I sustain the exclusion which the I.G. imposed and directed against Petitioner.

ISSUE

The issue in this case is whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Texas Medicaid program, within the meaning of section 1128(a)(1) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a licensed vocational nurse. I.G. Ex. 2 at 1.[2]

2. At all relevant times, Petitioner was employed as Assistant Director of Nursing at Coastal Health Care Center in Port Lavaca, Texas, a nursing home. I.G. Ex. 2, 6, 9, 10 at 1 - 2.

3. On September 6, 1991, Petitioner was indicted under Texas law for the criminal offense of unlawfully, intentionally, and knowingly possessing a controlled substance (pentazocine, also known by the brand name

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[2] With the motion for summary disposition the I.G. submitted nine exhibits and the affidavit of Sharon Thompson. I refer to the I.G.'s exhibits as I.G. Ex. (number) at (page). In the absence of objection I am admitting the I.G.'s nine exhibits into evidence. Also, I am admitting the affidavit of Sharon Thompson, which I am marking as I.G. Ex. 10. Petitioner submitted six exhibits with her response. I refer to Petitioner's exhibits as P. Ex. (number) at (page). In the absence of objection I am admitting Petitioner's six exhibits into evidence. I refer to the I.G.'s motion for summary disposition as I.G. Br. (page). I refer to Petitioner's response as P. Br. (page). I refer to the I.G.'s reply as I.G. R. Br. (page).

"Talwin") by fraud, misrepresentation, forgery, deception and subterfuge. I.G. Ex. 1 at 1 - 2.

4. Petitioner was specifically charged with making a false telephonic request, on or about January 3, 1991, to refill a prescription for Talwin on behalf of another individual (whom I shall refer to as MH) with the intent to unlawfully possess Talwin. I.G. Ex. 1 at 2.

5. On January 3, 1991, MH was a resident at Coastal Health Care Center. I.G. Ex. 2 at 2.

6. On January 3, 1991, MH was a recipient of benefits under the Texas Medicaid program. I.G. Ex. 5, 10 at 1 - 2.

7. MH's stay at Coastal Health Care Center on January 3, 1991 was an item or service which was reimbursed by the Texas Medicaid program. I.G. Ex. 5, 6, 10 at 1 - 2.

8. On January 2, 1992, Petitioner pleaded guilty to the criminal charges against her under an arrangement wherein an adjudication of guilt would be deferred, subject to her satisfactory completion of a term of probation, payment of restitution, a fine, court costs, and completion of 180 hours of community service. I.G. Ex. 3 at 1 - 5.

9. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i)(4) of the Act. Finding 8; Social Security Act, section 1128(i)(4).

10. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Texas Medicaid program, within the meaning of section 1128(a)(1) of the Act. Findings 1 - 9; Social Security Act, section 1128(a)(1).

11. The Secretary of the Department of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

12. The exclusion imposed and directed against Petitioner by the I.G. is for five years, the minimum period required under the Act. Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

13. The exclusion imposed and directed against Petitioner by the I.G. is mandated by law. Findings 1 - 12; Social Security Act, sections 1128(a)(1) and 1128(c)(3)(B).

ANALYSIS

There are no disputed material facts in this case. Petitioner does not deny that she was convicted, under Texas law, of the crime of unlawful possession of a controlled substance, Talwin. Petitioner does not deny that she was convicted of unlawfully obtaining Talwin by falsely representing to a pharmacy that she was refilling a prescription for Talwin on behalf of a resident at the nursing home at which she was employed. Petitioner does not dispute that the resident in question, MH, was a Medicaid recipient and that her stay at the nursing home was reimbursed by the Texas Medicaid program. Petitioner admits that her crime was related to MH's Medicaid-reimbursed stay at the nursing home, and hence, was related to the delivery of an item or service under Medicaid within the meaning of section 1128(a)(1) of the Act. P. Br. 1.[3]

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[3] The I.G. asserts also that the prescription for the controlled substance that Petitioner obtained unlawfully, Talwin, was reimbursed by the Texas Medicaid program, and Petitioner does not dispute this assertion. The I.G. contends that the Talwin which Petitioner obtained unlawfully, therefore, was a Medicaid item or service. Petitioner does not dispute this assertion either. It is unnecessary for me to find that the Talwin which Petitioner obtained unlawfully was a Medicaid item or service in order to find that Petitioner was convicted of a program-related crime within the meaning of section 1128(a)(1). The requisite nexus is established by virtue of MH's Medicaid-reimbursed stay at the nursing home. Therefore, I do not make findings on the issue of whether the Talwin which Petitioner obtained unlawfully is a Medicaid item or service. I note, however, that if I had made findings, it is likely that I would have found that the Talwin was not a Medicaid item or service. The evidence submitted by the I.G. shows that the prescription for Talwin may not have been renewed by the physician prescribing it. See, I.G. Ex. 2. Petitioner made a false representation that Talwin had been prescribed, in order to obtain it for her own use. Furthermore, the pharmacy may have already known that a false representation had been made when it submitted a reimbursement claim to Medicaid for the Talwin, and also the Texas Medicaid Fraud Control Unit may have been aware that the representation was false at the time the pharmacy submitted the claim. My point is not that there was complicity or wrongdoing by the pharmacy, but that the Talwin which Petitioner obtained under false pretenses might not be a "Medicaid item or service."

Petitioner's only argument is that the I.G. has not proven that the I.G. was aware of the underlying facts of the case when the I.G. excluded Petitioner.[4] Therefore, according to Petitioner, the I.G. has not demonstrated in the motion for summary disposition that the I.G. had authority to exclude Petitioner under section 1128(a)(1). P. Br. 2 - 3.

The undisputed material facts of this case establish a basis for excluding Petitioner pursuant to section 1128(a)(1) of the Act. The misrepresentations of fact made by Petitioner in order to obtain Talwin unlawfully were dependent on the facts that MH, a Medicaid recipient, was a patient at the nursing home at which Petitioner was employed, and that MH had in the past been prescribed Talwin as an ancillary aspect of her stay in that nursing home. Petitioner's crime was thus made possible by MH's status as a Medicaid recipient who was receiving a Medicaid-reimbursed stay at the nursing home at the time the crime was committed. Thelma Walley, DAB 1367 (1992); Thelma Walley, DAB CR255 (1993). Petitioner's conviction therefore was related to the delivery of an item or service under the Texas Medicaid program.

I do not agree with Petitioner's contention that the I.G. must prove that all facts material to this case were known to the I.G. at the time of the exclusion. The hearing in this case is not an appellate review of the I.G.'s exclusion determination. It is a de novo hearing, at which the I.G. must prove that facts exist which provide a basis for the exclusion. The date on which those facts became known to the I.G. is not material, so long as the I.G. can prove at the hearing that the exclusion is authorized by law.

Furthermore, section 1128(a)(1) of the Act establishes that in any exclusion case brought under that section the

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[4] Petitioner has characterized her exclusion as a license suspension. P. Br. 2 - 3. In fact, the I.G. has not suspended or otherwise taken away from Petitioner any license to practice health care. Rather, the I.G. has excluded Petitioner from participating in the Medicare and Medicaid programs. The effect of this exclusion is that Petitioner may not claim reimbursement for any items or services she furnishes to the Medicare or Medicaid programs or their beneficiaries and recipients during the period of her exclusion. See I.G.'s January 12, 1993 notice of exclusion at 1 - 2.

issue is whether a party has been convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid, and not whether the I.G. can prove that the I.G. knew, at a particular date, whether the party had been convicted of such an offense. The Act mandates exclusion of individuals convicted of program-related offenses. Thus, the ultimate issue in any case under section 1128(a)(1) is whether the facts which mandate an exclusion are present. Whether the I.G knew of those facts as of a particular date is irrelevant.[5]

However, it is apparent from the undisputed material facts of this case and the exhibits offered by the I.G. that the facts which the I.G. now adduces, and which Petitioner does not now dispute, were known to the I.G. as of the date that the I.G. excluded Petitioner. The notice of exclusion which the I.G. sent to Petitioner refers to Petitioner's conviction. The documents on which that conviction was predicated specifically recite that Petitioner had obtained Talwin by making a false telephone request for the medication on behalf of MH. Finding 4. Petitioner has not asserted that the notice of exclusion is untrue, or that it is not based on facts which were in the possession of the I.G. at the time Petitioner was excluded.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. The five-year exclusion which the I.G. imposed and directed against Petitioner was mandated by law. Therefore, I sustain the exclusion.

/s/

Steven T. Kessel
Administrative Law Judge

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[5] The I.G. would not exclude a party under section 1128(a)(1) unless the I.G. thought that facts existed which justified such an exclusion. The I.G. is not excluding parties randomly.