Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Glynis A. Feole, a/k/a Glynis A. Magee, a/k/a Glynis A. Seole,	)	Date: March 20, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-665
	)	Decision No. CR1762
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, Glynis A. Feole, 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

Petitioner Glynis A. Feole is a Registered Nurse and was licensed to practice in the State of Rhode Island. In 2006, she was employed at the Morgan Health Center, where an individual identified as WJC in this discussion was a resident and Medicare beneficiary.

In June 2006, Petitioner became the subject of an investigation undertaken by the Rhode Island Attorney General. The misconduct alleged against her was the theft of a single 80 mg dose of Oxycontin from WJC's evening medications and her substitution of another medication for WJC's dose of Oxycontin. Eventually she was named in an Information filed by the Attorney General charging her with one felony count of Larceny of a Controlled Substance in violation of R.I. GEN. LAWS § 21-28-4.16.1 (2002). On October 18, 2006, as the apparent result of a negotiated plea, Petitioner pleaded *nolo contendere* to

a misdemeanor larceny charge based on the value of the medication Petitioner admitted stealing. The misdemeanor charge was framed by handwritten interlineation of the original felony Information, but the interlineation did not explicitly set out the chapter, article, and section of the statute it purported to invoke. Other court records identify the statute as R.I. GEN. LAWS § 11-41-1 (2002). Petitioner was sentenced on the same day to a suspended term of one year's jail time and one year of probation, and was assessed $90.00.

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. 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 counsel, Petitioner timely sought review of the I.G.'s action by letter dated August 22, 2007. I convened a telephonic prehearing conference on September 20, 2007, 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 pleadings, and by Order of September 20, 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 February 21, 2008.

The evidentiary record on which I decide the issues before me comprises 13 exhibits. The I.G. proffered six exhibits marked I.G. Exhibits 1-6 (I.G. Exs. 1-6). Petitioner proffered seven exhibits marked Petitioner's Exhibits 1-7 (P. Exs. 1-7). In the absence of objection, all proffered exhibits are admitted as designated.

II. Issues

The issues before me are 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.

The I.G.'s position on both issues is correct. Section 1128(a)(1) of the Act mandates Petitioners exclusion, for her predicate conviction has been established. A five-year period of exclusion is reasonable *ipso jure*, for 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." Title XVIII of the Act is the Medicare 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.

The crime of Larceny of a Controlled Substance is defined in Rhode Island by a specific statute, R.I. GEN. LAWS § 21-28-4.16.1 (2002), which provides:

> Any person who steals or attempts to steal any controlled substance from a health care facility, as defined in § 23-17-2, a licensed pharmacy, or any other lawful place of business, where controlled substances are compounded, dispensed, administered, stored, or manufactured . . . shall be punished by a fine of not more than ten thousand dollars ($10,000), or by imprisonment of not more than ten (10) years, or both.

In Rhode Island, the crime of larceny is in most cases classified and punished according to the value of the property or money wrongfully obtained. As classified by R.I. GEN. LAWS § 11-41-5 (2002):

> If the value of the property or money does not exceed five hundred dollars ($500), the person shall be punished by imprisonment for not more than one year, or by a fine of not more than five hundred dollars ($500), or both.

Based on that provision of Rhode Island law, the offense of which Petitioner was convicted is classified as a misdemeanor. R. I. GEN. LAWS § 11-1-2 (2002).

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 *nolo contendere* on October 18, 2006, in the Superior Court for the Counties of Providence and Bristol, Rhode Island, Petitioner Glynis A. Feole was found guilty of the misdemeanor offense of larceny, in violation of R.I. GEN. LAWS § 11-41-5 (2002). I.G. Exs. 5, 6; P. Exs. 2, 3, 5.

2. Final judgment of conviction was entered against Petitioner, and sentence was imposed upon her, in the Superior Court on October 18, 2006. I.G. Exs. 5, 6; P. Exs. 2, 3, 5.

3. The accepted plea of *nolo contendere*, 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 the Medicare program. I.G. Exs. 3, 4, 5, 6, 8; P. Exs. 2, 3, 4, 5; *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. I.G. Ex. 1; P. Ex. 1.

6. Acting through counsel, Petitioner perfected her appeal from the I.G.'s action by filing a timely hearing request on August 22, 2007.

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 this record.

Petitioner does not deny that she has been convicted. The evidence of her misdemeanor conviction is clear and undisputed: I.G. Ex. 6 shows that on October 18, 2006, Petitioner appeared with counsel in the Superior Court and pleaded *nolo contendere* to the misdemeanor crime of larceny. The trial court's acceptance of that *nolo contendere* plea is demonstrated by the fact that the trial court found Petitioner guilty and proceeded immediately to the imposition of sentence. I.G. Ex. 6; P. Ex. 2. Those events 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 is based on four arguments. It is based partly on her denial of a nexus or common-sense connection between her crime and the Medicare program, the second essential element; partly on the fact that she appears here convicted of a misdemeanor, and not a felony; and partly on her assertion that the I.G. should have

reviewed her misdemeanor conviction under the discretionary authority conveyed to him by section 1128(b)(1)(a) of the Act. Petitioner then synthesizes these first three arguments into a fourth, by which she asserts that the proposed five-year exclusion is excessive and therefore unreasonable.

Petitioner's first argument is that there is no "nexus"or "common sense connection" between her crime and the Medicare programs. This argument fails. The Departmental Appeals Board has always interpreted the "related to the delivery item" broadly and there exists a common sense connection between the criminal act and the program present here as a matter of fact. *Berton Siegel, D.O.*, DAB No. 1467. The taking of the medication from Medicare recipients is enough to establish the common sense connection between the criminal act and the program since the drug is reimbursed by Medicare and is or was intended for a Medicare patient. *Andrew Goddard*, DAB No. 2032 (2006); *Thelma Walley,* DAB No. 1367.

Petitioner's second argument is that misdemeanor convictions should be under 1128(b)(1) and not 1128(a)(1). This argument also fails. The plain language of section 1128(a)(1) makes no distinction between criminal convictions based on misdemeanors and convictions based on felonies, meaning that there need not be a distinction in the classification (misdemeanor or felony) of criminal cases for exclusion from Medicare and other federal healthcare programs under 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); *Katie Herman*, DAB CR1703 (2007).

Petitioner's third argument is that section 1128(b)(1) is more appropriate for the situation. Petitioner's argument again fails. Section 1128(b)(1) provides for permissive rather than mandatory exclusions from Medicare and other federal healthcare programs as long as the crime was not related to Medicare or any other federal healthcare programs. But once a conviction is shown to be within the meaning of 1128(a)(1), "a criminal conviction relating to Medicare or any other federal healthcare program," it is mandatory that section 1128(a)(1) be used in that situation and neither the I.G. nor the Administrative Law Judge may choose to proceed otherwise. *Stacy Ann Battle, D.D.S.*, DAB No. 1843 (2002); *Tarvinder Singh, D.D.S.*, DAB no. 1752 (2000); *Lorna Fay Gardner*, DAB 1733; *Douglas Schram, R.PH.*, DAB No. 1372 (1992); *Niranjana B. Parikh, M.D.*, DAB No. 1334 (1992). The rule is clear: if 1128(a)(1) is applicable then it must be applied. *Katie Herman*, DAB CR1703 (2007).

Petitioner's forth and final argument is that 1128(a)(1)'s five-year exclusion from Medicare and other federal healthcare programs is excessive and therefore unreasonable. Petitioner's final argument fails as well. Five years is the minimum period allowed as established by Congress; thus, 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 in the I.G.'s favor 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 Glynis A.Feole 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