Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Catherine R. Kinnunen,	)	Date: January 14, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-577
	)	Decision No. CR1889
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* Catherine R. Kinnunen 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 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 five-year exclusion, and for that reason I grant the I.G.'s Motion for Summary Affirmance.

I. Procedural Background

Petitioner *pro se* Catherine R. Kinnunen was employed as a caregiver at The Seaside House, Seaside, Oregon, in 2005 and 2006. The Seaside House is an assisted living facility and some of its residents are Medicaid beneficiaries. From February 2005 until January 2006, Petitioner forged checks on the personal bank accounts of at least four residents of Seaside House, three of whom were Medicaid beneficiaries.

This activity came to the attention of Seaside House administrators, who in February 2006 reported it to local authorities. Petitioner was arrested and questioned and at first denied wrongdoing. Her denials notwithstanding, Petitioner and her appointed attorney reached a plea agreement with the Clatsop County District Attorney and on October 26, 2006, Petitioner appeared with counsel in the Circuit Court for Clatsop County, State of Oregon, and pleaded *nolo contendere* to four misdemeanor counts of Forgery in the Second Degree, in violation of OR. REV. STAT. § 165.007. The Circuit Court entered its

Judgment and sentence on November 13, 2006: Petitioner was placed on two years' probation, and was ordered to pay restitution in the sum of $5051, fees of $405, and assessments of $268.

On August 31, 2007, the I.G. attempted to notify 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. Although the precise circumstances are not clear, the record suggests that Petitioner's move from Oregon to North Dakota prevented her prompt receipt of the I.G.'s August 31, 2007 letter, and the I.G. sent Petitioner another copy to her current address under separate cover dated April 21, 2008. Petitioner timely sought review of the I.G.'s action by her *pro se* letter dated June 23, 2008.

I convened a telephonic prehearing conference on August 18, 2008, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures for addressing the case. By Order of that date, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case is closed under the circumstances, findings, and conclusions set out in my Order of December 11, 2008.

The evidentiary record on which I decide the issues before me contains seven exhibits, all proffered by the I.G. and marked I.G. Exhibits 1-7 (I.G. Exs. 1-7). Petitioner proffered no exhibits of her own and did not object to the I.G.'s proffer. In the absence of objection, I admit I.G. Exs. 1-7.

II. Issues

The issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the 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. Because her predicate conviction has been established, section 1128(a)(1) of the Act mandates Petitioner's exclusion. 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.

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; or "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. 42 U.S.C. § 1320a-7(i)(1)-(3). 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 pleas of *nolo contendere* on October 26, 2006, in the Circuit Court for Clatsop County, State of Oregon, Petitioner Catherine R. Kinnunen was found guilty of four counts of the criminal offense of Forgery in the Second Degree, in violation of OR. REV. STAT. § 165.007. I.G. Exs. 3, 4, 6.

2. The accepted pleas of *nolo contendere,* the finding of guilt, and the judgment of conviction described above constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act, and 42 C.F.R. § 1001.2.

3. A nexus and a common-sense connection exist between Petitioner's conviction, as noted above in Findings 1 and 2 above, and the delivery of an item or service under a State health care program. I.G. Exs. 4, 5, 6, 7. *Berton Siegel, D.O.,* DAB No. 1467 (1994).

4. By reason of Petitioner's conviction, a basis exists for the I.G.'s determination to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, pursuant to section 1128(a)(1) of the Act.

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 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. *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992). These two essential elements are fully established in the record before me.

The first essential element is conclusively established by the Circuit Court records, which include the Defendant's Petition to Enter Plea, by which Petitioner, her counsel, and the prosecuting attorney negotiated Petitioner's nolo contendere pleas (I.G. Ex. 3), the original charging document in the prosecution, the Complaint (I.G. Ex. 4), and the Circuit Court's Judgment, by which the disposition of the prosecution was recorded (I.G. Ex. 6). The I.G. has proved the first essential element.

The second essential element — the nexus or common-sense connection to the delivery of an item or service under a protected health care program — is present when a caregiver or administrator, acting in a setting where care is being provided by that person or under that person's supervision, steals from the person or persons being cared for. One particularly cogent statement of the notion appears in *Kim Anita Fifer*, DAB CR1016 (2003). While that case involved an exclusion based on section 1128(a)(3) of the Act, its rationale fits this section 1128(a)(1) exclusion perfectly:

> A nursing facility must rely on the honesty and integrity of its employees in order to provide necessary nursing care and housekeeping services. Here, because she held positions of trust, Petitioner had access to personal information on nursing home residents. She violated that trust and victimized those individuals that she was supposed to be serving. Her

> actions are no different than those of any nursing facility employee using his/her position to rob or otherwise exploit vulnerable facility residents.

Kim Anita Fifer, DAB CR1016, at 4.

Section 1128(a)(1) applies only in the context of a protected program, while section 1128(a)(3) is not so restricted. Here, three of the four residents victimized by Petitioner were Medicaid beneficiaries. I.G. Ex. 7. Petitioner gained access to her victims' checkbooks during the course of her employment as one of their caregivers. I.G. Ex. 5. There is ample support for my finding that the required nexus or common-sense connection exists when private property is converted by criminal means or stolen from Medicare or Medicaid beneficiaries. *Andrew L. Branch*, DAB CR1359 (2005); *Tenisha Taylor, a/k/a Tenisha Carter*, DAB CR1132 (2004); *Dorothy A. Woodrum*, DAB CR956 (2002); *Roberta E. Miller*, DAB CR367 (1995); *Teri L. Gregory*, DAB CR336 (1994); *Gary Gregory*, DAB CR274 (1993); *Jerry L. Edmonson*, DAB CR59 (1989). The I.G. has proved the second essential element.

Petitioner's *pro se* defense to the proposed exclusion is not developed in depth, but the core of it is that she proclaims her innocence of crime and denies the truth of the charges, the competence of her appointed attorney, the wisdom and soundness of her pleas, the validity of the judgment of conviction in the Circuit Court, and the fundamental fairness of the proceedings that led to her conviction. In the interests of that fundamental fairness, it may be best to set out her position in her own words:

> I pleaded nolo-contendere, because of the stress I endured for almost a year, some think I got a good deal, what kinda deal, can't do what I know and do good - have a fine of over $6,000.00 dollars, had to do things I shouldn't have, I have a record, and medicaid fraud. Hindsight I should of took it to trial, if I knew then what I know now, and better representation. Things like this can make a person disgruntle, I am angry actually I am mad as hell . . . .

Pet. Answer Brief, at 3-4.

Her arguments are no defense to the exclusion. In exclusion proceedings like this one, any form of collateral attack on predicate convictions is categorically precluded by regulation at 42 C.F.R. § 1001.2007(d), and that categorical preclusion has been affirmed repeatedly by the Departmental Appeals Board (Board). *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Susan Malady, R.N.,* DAB No. 1816 (2002); *Dr. Frank R. Pennington, M.D.*, DAB No. 1786 (2001); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Paul R. Scollo, D.P.M.*, DAB No. 1498 (1994); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993).

Because Petitioner appears here *pro se*, I have taken additional care in reading her brief and her request for hearing, guided by the Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D.*, *et al.,* DAB No. 1264 (1991). I have searched for any arguments or contentions that might raise a valid defense to the proposed exclusion. I have found nothing that could be so construed.[1]

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, and this Decision is issued 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 Catherine R. Kinnunen 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

[1] I am aware that Petitioner's November 17, 2008 letter — received as her Answer Brief by the terms of my Order of December 11, 2008 — makes an unspecific and unsupported assertion that "I had sent evidence regarding my appeals, however it went to the wrong department, and asked if it could please be forwarded to the appropriate department." Having learned in *Mark K. Mileski*, DAB No. 1945 (2004), that a certain quantum of mischief can attend such assertions, I here note that I give absolutely no credence to Petitioner's assertions concerning mis-sent evidence, if for no other reason than her conviction of *crimena falsi*. *See*, *e.g.*, FED. R. EVID. 404(b). But on the assumption *arguendo* that some documents may have been mis-sent, there is still no reasonable likelihood that any such documents might negate the proof of the two essential elements.