**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Heather A. Panek,
(OI File No. H-15-42614-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-333

Decision No. CR4668

Date: July 29, 2016

# DECISION

Petitioner, Heather A. Panek, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(1)(A)(i) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(1)(A)(i)), effective February 18, 2016. Exclusion is based on Petitioner's conviction of a misdemeanor criminal offense related to fraud, committed after August 21, 1996, in connection with the delivery of a health care item or service. Petitioner's exclusion for a minimum period of three years is not unreasonable considering the presence of one aggravating factor and one mitigating factor. Act § 1128(c)(3)(D) (42 U.S.C. § 1320a-7(c)(3)(D)); 42 C.F.R. § 1001.201(b)(1).[1]

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion. Citations are to the 2015 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

## I. Background

The Inspector General (I.G.) for the Department of Health and Human Services notified Petitioner by letter dated January 29, 2016, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of three years. The I.G. cited section 1128(b)(1) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based upon her misdemeanor conviction in the Court of Common Pleas of Blair County, Pennsylvania.

Petitioner timely requested a hearing through counsel on February 12, 2016 (RFH). On February 25, 2016, the case was assigned to me to hear and decide. I convened a telephone prehearing conference on March 28, 2016, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued on March 29, 2016. Petitioner waived an oral hearing and the parties agreed that this matter may be resolved based upon the parties' briefs and documentary evidence. Prehearing Order at 3. On April 26, 2016, the I.G. filed his brief and I.G. Exhibits (Exs.) 1 through 6. Petitioner filed her brief (P. Br.) on May 23, 2016, with no exhibits. The I.G. filed a reply brief on June 9, 2016 (I.G. Reply). Petitioner did not object to my consideration of I.G. Exs. 1 through 6 and they are admitted as evidence.

## II. Discussion

### A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

Pursuant to section 1128(b)(1)(A) of the Act (42 U.S.C. § 1320a-7(b)(1)(A)), the Secretary may exclude from participation in any federal health care program an individual convicted under federal or state law of a misdemeanor criminal offense committed after August 21, 1996, related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of any health care item or service or with respect to any act or omission in a health care program not subject to section 1128(a)(1), operated by or financed in whole or part by any federal, state, or local government. Pursuant to section 1128(b)(1)(B) (42 U.S.C. § 1320a-7(b)(1)(B)), the Secretary may exclude from participation in any federal health care program an individual convicted under federal or state law of a misdemeanor criminal offense committed after August 21, 1996, related to fraud, theft, embezzlement,

breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program other than a health care program operated or financed by a federal, state or local government. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.201(a).

Section 1128(c)(3)(D) of the Act provides that an exclusion imposed under section 1128(b)(1) of the Act will be for a period of three years, unless the Secretary determines in accordance with published regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances. 42 C.F.R. § 1001.201(b). Authorized aggravating and mitigating factors are listed in 42 C.F.R. § 1001.201(b)(2) and (3).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

### B. Issues

The Secretary has by regulation limited my scope of review to two issues:

> Whether the I.G. has a basis for excluding an individual or entity from participating in Medicare, Medicaid, and all other federal health care programs;
>
> and
>
> Whether the length of the proposed exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

### C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

**1. Petitioner timely filed her request for hearing, and I have jurisdiction.**

**2. An oral hearing was waived by the parties and decision on the pleadings and documentary evidence is appropriate.**

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to a hearing before an ALJ, and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2-.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). Petitioner waived an oral hearing and the parties agreed that this matter may be resolved based upon the parties' briefs and documentary evidence. Prehearing Order at 3.

**3. Petitioner was convicted of an offense related to fraud within the meaning of section 1128(b)(1)(A)(i) of the Act.**

**4. Petitioner was convicted of an offense related to the delivery of a health care item or service within the meaning of section 1128(b)(1)(A)(i) of the Act.**

**5. There is a basis for Petitioner's exclusion from Medicare, Medicaid, and all other federal health care programs under section 1128(b)(1)(A)(i) of the Act.**

**a. Facts**

Petitioner does not dispute that on June 9, 2015, she was convicted, pursuant to her guilty pleas, in the Court of Common Pleas of Blair County, Pennsylvania (state court) of one misdemeanor count of refusal to keep records required by the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act (Pennsylvania Controlled Substance Act) and one misdemeanor count of furnishing false or fraudulent material information, violations of "35 Pennsylvania Statutes (P.S.) § 780-113(a)(21) [and](a)(28)" P. Br. at 3; I.G. Exs. 3, 4, 5. The charges to which Petitioner pleaded guilty alleged the misdemeanor offenses as follows:

> [Count 1:] The refusal or failure to make, keep or furnish any record, notification, order form, statement, invoice or information required under this act.

> [Count 2:] The furnishing of false or fraudulent material information in, or omission of any material information from any application, report, or other document required to be kept or filed under this act, or any record required to be kept by this act.

I.G. Ex. 3. The police complaint, a copy of which Petitioner filed with her request for hearing and a copy of which was admitted without objection as I.G. Ex. 4, alleged that Petitioner was licensed to dispense controlled substances, but she failed to make, keep, or furnish the record of her dispensing of oxycodone and Adderall™ to patients. The complaint alleged that Petitioner furnished false or fraudulent material information, or omitted material information related to dispensing oxycodone and Adderall™, on documents or records that were required to be kept by the Pennsylvania Controlled Substance Act. The complaint alleges that the violations occurred between May 20, 2014 and June 25, 2014, when Petitioner removed on numerous occasions, using another nurse's login identification, Adderall™ or oxycondone, both Schedule II controlled substances, from the "MedDispense" unit (an automatic drug dispensing device) and falsely documented the administration of the drugs, the return of the drugs, or the wasting (disposal) of the drugs. I.G. Ex. 4; RFH. Petitioner was sentenced on May 29, 2015, to pay fines totaling $200 and two years of probation. I.G. Ex. 5; P. Br. at 3.

**b. Analysis**

The I.G. notice of exclusion dated January 29, 2016, cited section 1128(b)(1) of the Act as the basis for Petitioner's exclusion. I.G. Ex. 2. In briefing before me, the I.G. argues more precisely that the permissive exclusion is authorized by section 1128(b)(1)(A)(i) of the Act. I.G. Br. at 3, 6; I.G. Reply at 2. Section 1128(b)(1)(A)(i) of the Act provides:

> (b) PERMISSIVE EXCLUSION. – The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> (1) CONVICTION RELATING TO FRAUD. – Any individual or entity that has been convicted for an offense which occurred after [August 21, 1996] the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law –
>
> (A) of a criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct –

> (i) in connection with the delivery of a health care item or service, . . .

The parties agree that the elements for exclusion pursuant to section 1128(b)(1)(A)(i) are: (1) conviction in a state or federal court; (2) of a misdemeanor offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the offense occurred after August 21, 1996; and (4) the offense is in connection with the delivery of a health care item or service. P. Br. at 5; I.G. Br. at 3.

Petitioner admits that she pleaded guilty to one count of furnishing false or fraudulent material information in violation of the Pennsylvania Controlled Substance Act. P. Br. at 5. She also does not dispute that she was convicted of two misdemeanor offenses by a state court. An individual or entity is considered to have been "convicted" of an offense if, among other things, a judgment of conviction is entered, or a guilty plea or no contest plea is accepted by a federal, state, or local court. Act § 1128(i)(1), (3) (42 U.S.C. § 1320a-7(i)(1), (3)). Petitioner's guilty pleas were accepted by the state court and a judgment of conviction was entered by the state court. Therefore, Petitioner was convicted within the meaning of section 1128(i) of the Act.

Petitioner does not dispute that the offenses for which she was convicted occurred between May and June 2014, which is after August 21, 1996. I.G. Exs. 3, 4.

Petitioner admitted to and was convicted of one count of furnishing false or fraudulent material information. Generally, fraud is defined as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." Black's Law Dictionary 685 (8th ed. 2004). It is not necessary to look beyond the language of the Pennsylvania statute that Petitioner admitted she violated to determine that the required element of fraud existed. I conclude that the element of fraud, which Petitioner admitted to by her guilty plea, was sufficient to satisfy the requirement of section 1128(b)(1)(A)(i) for an offense related to fraud. *See Richard E. Bohner*, DAB No. 2638 (2015).

Finally, I conclude that Petitioner's offenses were related to the delivery of a health care item or service because Petitioner abused her authority as a nurse in order to gain access to the controlled substances. Further, she failed to report the disposition of those substances pursuant to her duty under the Pennsylvania Controlled Substance Act. Accordingly, I conclude that the I.G. has made a prima facie showing of the elements necessary for permissive exclusion pursuant to section 1128(b)(1)(A)(i) of the Act.

Petitioner argued in her request for hearing that permissive exclusion is not appropriate because her criminal conviction was not for an offense involving pecuniary gain or financial misconduct. This argument is without merit. The Departmental Appeals Board

considered and rejected a similar argument in *Bohner*, DAB No. 2638. In *Bohner*, the Board considered a permissive exclusion under section 1128(b)(1)(A)(i) of the Act. The Board concluded that the misdemeanor conviction need not be for the offense of fraud; it is only required that the offense be related to fraud. Whether or not an offense is related to fraud is determined by looking at the underlying facts. The Board also concluded that the phrase in section 1128(b)(1)(A)(i), "related to fraud," is not limited to financial misconduct. *Bohner*, at 8-14. The Board's analysis in *Bohner* is persuasive. Petitioner concedes that she was convicted of a misdemeanor offense of furnishing false or fraudulent material information in violation of the Pennsylvania Controlled Substance Act. Therefore, the charge to which Petitioner pleaded guilty and for which she was convicted reflects on its face that it was related to fraud. I conclude that the fact that Petitioner was not convicted of an offense that was clearly related to financial misconduct is not a defense to permissive exclusion pursuant to section 1128(b)(1)(A)(i) of the Act so long as the offense was related to fraud, as it was in this case.

Petitioner also argues in her request for hearing that there is no evidence that her offenses compromised patient care or impaired the performance of her professional duties. She argues that the evidence does not show that she lacked financial integrity; perpetrated any systemic fraud; or fraudulently billed Medicare, Medicaid, or any other federal program or insurance carrier. None of these arguments address the elements for permissive exclusion pursuant to section 1128(b)(1)(A)(i). None of these arguments negate the I.G.'s prima facie showing of a basis for permissive exclusion in this case. These assertions are also not assertions of fact that are mitigating factors that may be considered under 42 C.F.R. § 1001.201(b)(3). Accordingly, these arguments do not affect my decision in this case.

Petitioner argues in her brief that the I.G. has no legal basis to exclude her under section 1128(b)(1)(A)(i) of the Act because the offenses for which she was convicted were not in connection with the delivery of a health care item or service. Petitioner raises several arguments in support of her position that her offense was not related to the delivery of a health care item or service. Petitioner states in her brief, "[t]he factual crux . . . involves her improper use of another nurse's login and failure to properly document the administration of medications to patients." P. Br. at 6. Petitioner argues that there were no allegations that her misconduct involved the unlawful diversion of narcotics from patients to herself or that she falsified patient records to give the impression that patients had received their medications. P. Br. at 6-7. Petitioner argues that there is no evidence that her misconduct compromised patient care. RFH; P. Br. at 6-7. Petitioner argues further that she did not illegally distribute controlled substances, fraudulently bill Medicare, Medicaid, or any federal program or insurance carrier, or engage in "any sort of systemic fraud." RFH; P. Br. at 6-7. Petitioner's arguments are meritless. The Board has repeatedly concluded that for an offense to be "in connection with the delivery of a health care item or service," all that needs to be shown is a "common sense connection or nexus" between the conviction and the delivery of a health care item or service. *See*

*George John Schulte*, DAB No. 2649 at 7 (2015). In this case, there is an obvious nexus between Petitioner's offense and the delivery of a health care item or service. Petitioner was a nurse. The evidence shows she was on duty at the time she committed her offenses. Petitioner had access to the controlled substances because she was a nurse. Petitioner does not dispute that the controlled substances were health care items. Petitioner failed in her duty as a nurse to report the disposition of the controlled substances as required by state law. These facts are all that are necessary to find the required nexus. Although unnecessary, it may also be inferred that by unlawfully removing drugs from the MedDispense machine, Petitioner directly impacted the delivery of these drugs by diverting them away from their intended recipients – the patients. Petitioner's failure to properly document the disposition of the drugs, which were controlled substances, also bears a direct connection to the delivery of a health care item or service, particularly to the extent that Petitioner's actions resulted in loss of control of the drugs. Petitioner argues that there is no evidence supporting unlawful diversion of narcotics by Petitioner. P. Br. at 6. To the contrary, Petitioner admitted by her pleas and in pleadings before me that she obtained controlled substances fraudulently or by false pretenses (even though she was not specifically convicted of those acts which are, therefore, not a basis for exclusion) by using another nurse's identity, thereby preventing proper disposition of those drugs either by administration of the specific pills or capsules to the proper patient or by destruction. The evidence does not show what Petitioner did with the controlled substances, but evidence of their ultimate disposition is not required in this case.

Contrary to Petitioner's arguments, the fact that her misconduct may not have any connection to Medicare, Medicaid, any other federal health care program, or insurance carrier is irrelevant, for all that is required is that her offense was "in connection with the delivery of a health care item or service." Act § 1128(b)(1)(A)(i); 42 C.F.R. § 1001.201(a)(1)(i). There is also no requirement in either the statute or the regulation that "systemic fraud" or patient harm must have resulted from Petitioner's misconduct in order for the required nexus to be found. The facts Petitioner admitted by her guilty pleas are more than sufficient to establish that her offenses were related to the delivery of a health care item or service.

### 6. Petitioner's exclusion for three years is not unreasonable considering the presence of one aggravating and one mitigating factor.

The period of exclusion under section 1128(b)(1) is three years, unless aggravating or mitigating factors justify lengthening or shortening that period. Act § 1128(c)(3)(D); 42 C.F.R. § 1001.201(b)(1). Only the aggravating factors authorized by 42 C.F.R. § 1001.201(b)(2) may be considered to increase the period of exclusion, and only the mitigating factors authorized by 42 C.F.R. § 1001.201(b)(3) may be considered to reduce the period of exclusion. Pursuant to 42 C.F.R. § 1001.2002(c)(2), the I.G. is required to state in the notice of exclusion the factors considered in setting the length of the

exclusion. The notice letter in this case did not state that the I.G. considered any aggravating or mitigating factors in determining the length of Petitioner's exclusion. I.G. Ex. 2. Because the notice letter is silent as to aggravating or mitigating factors, I conclude that no such factors were considered by the I.G. rather than concluding that the notice violated the requirement of 42 C.F.R. § 1001.2002(c)(2). My conclusion is consistent with the I.G.'s assertions in his opening brief that "the I.G. did not apply any aggravating or mitigating factors to lengthen or shorten the minimum three-year period of exclusion." I.G. Br. at 7 (citing I.G. Ex. 2).

Petitioner, however, in her response brief, argues that the mitigating factor listed at 42 C.F.R. § 1001.201(b)(3)(i) exists because she was convicted of three or fewer offenses, and there was no evidence of any financial loss to a government program or to other individuals or entities as a result of her criminal acts. Petitioner argues that the presence of this mitigating circumstance should provide a basis for determining that the three-year exclusion is "impermissibly long." P. Br. at 8. Petitioner also cites the fact that she received a two-year suspension from the State Board of Nursing of the Commonwealth of Pennsylvania (State Board of Nursing) and argues that, to the extent she is excluded and mitigating evidence is considered, she should be excluded "for two years at most," consistent with the Nursing Board's determination. P. Br. at 8.

In his reply brief, the I.G. agrees that Petitioner was convicted of only two misdemeanor offenses and that no restitution was ordered that would indicate loss to the government. The I.G. agrees that these facts may be considered mitigating under 42 C.F.R. § 1001.201(b)(3)(i) and a basis for shortening the exclusion period. The I.G. argues that the two-year suspension of Petitioner's nursing license is not a mitigating factor but an aggravating factor under 42 C.F.R. § 1001.201(b)(2)(vi), which provides a basis for lengthening her exclusion. The I.G. argues that "[a]fter weighing the single aggravating factor and single mitigating factor present in Petitioner's case, the I.G. determined to set the period of exclusion at the three-year statutory minimum." I.G. Reply at 6. The I.G. asserted that the baseline three-year exclusion was reasonable "[g]iven the nature of Petitioner's conduct and that the [Nursing] Board also deemed Petitioner sufficiently untrustworthy and suspended her nursing license." I.G. Reply at 6. The I.G.'s challenge is that there is no evidence that at the time of the exclusion, the I.G. considered any aggravating or mitigating factors. To the contrary, the absence of any mention of factors in the notice letter gives rise to the presumption that no aggravating or mitigating factors were considered. It is not clear from the I.G. reply whether counsel or some other representative of the I.G. has reassessed the period of exclusion while this matter was pending before me or what authority might permit that action. Rather than elicit testimony or further briefing from the I.G. to clarify, I elect to exercise my authority under the regulations to ensure proper consideration of the aggravating and mitigating factors in this case. 42 C.F.R. § 1005.20(b).

The I.G. has conceded that the mitigating factor listed at 42 C.F.R. § 1001.201(b)(3)(i) exists in this case. Accordingly, I conclude that the evidence before me establishes the mitigating factor established by 42 C.F.R. § 1001.201(b)(3)(i), that is, Petitioner was convicted of three or fewer offenses and financial loss to the government was less than $1,500. This mitigating fact is a basis for reducing the period of exclusion.

I further conclude that the evidence indisputably shows that on August 19, 2015, the State Board of Nursing suspended Petitioner's license as a result of her conviction. I.G. Ex. 6; P. Br. at 8. The suspension of Petitioner's nursing license based on her conviction is clearly an aggravating factor under 42 C.F.R. § 1001.201(b)(2)(vi).

The Act requires that the period of a permissive exclusion under section 1128(b)(1) be three years, unless the Secretary determines it should be longer based on the presence of aggravating factors or mitigating factors that the Secretary established by regulation. Act § 1128(c)(3)(D). A mitigating factor may justify a reduction in the three-year period of exclusion, but the regulations do not state that it must result in a downward adjustment or how significant such an adjustment should be. 42 C.F.R. § 1001.201(b)(3). Similarly, where an aggravating factor is present in a case, the regulations do not require that it must result in lengthening the period of exclusion or how significant the adjustment should be. 42 C.F.R. § 1001.201(b)(2). The I.G. argues that a three-year exclusion was reasonable "[g]iven the nature of Petitioner's conduct" and the fact that the State Board of Nursing found her "sufficiently untrustworthy and suspended her nursing license." I.G. Reply at 6. Petitioner wants her exclusion reduced to two years to match the suspension imposed by the State Board of Nursing.

The applicable regulation broadly states that the ALJ must determine whether the length of exclusion imposed is "unreasonable." 42 C.F.R. § 1001.2007(a)(1). Pursuant to 42 C.F.R. § 1005.30(b), I have authority to "affirm, increase or reduce" the period of exclusion proposed by the I.G. or to reverse the exclusion. The Board, however, has made clear that the role of the ALJ in exclusion cases is more limited than suggested by the regulations. According to the Board, the ALJ's role is to conduct a de novo review of the facts related to the basis for the exclusion and the existence of aggravating and mitigating factors and to determine whether the period of exclusion imposed by the I.G. falls within a reasonable range. *Juan De Leon, Jr.*, DAB No. 2533 at 3 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725 at 17, n.9 (2000). The Board has explained that, in determining whether a period of exclusion is "unreasonable," the ALJ is to consider whether such period falls "within a reasonable range." *Cash*, DAB No. 1725 at 17, n.9. The Board cautions that whether the ALJ thinks the period of exclusion too long or too short is not the issue. The ALJ may not substitute his or her judgment for that of the I.G. and may only change the period of exclusion in limited circumstances.

In *John (Juan) Urquijo*, DAB No. 1735 (2000), the Board made clear that, if the I.G. considers an aggravating factor to extend the period of exclusion and that factor is not later shown to exist on appeal, or if the I.G. fails to consider a mitigating factor that is shown to exist, then the ALJ may make a decision as to the appropriate extension of the period of exclusion beyond the minimum. In *Gary Alan Katz, R.Ph.*, DAB No. 1842 (2002), the Board suggests that, when it is found that an aggravating factor considered by the I.G. is not proved before the ALJ, then some downward adjustment of the period of exclusion should be expected absent some circumstances that indicate no such adjustment is appropriate. Thus, the Board has by these various prior decisions significantly limited my authority under the applicable regulation to judge the reasonableness of the period of exclusion.

In this case, after de novo review, I have concluded that a basis for exclusion exists. I further conclude that there was an aggravating factor and a mitigating factor that the I.G. failed to consider. Therefore, I am required to determine whether some upward or downward adjustment of the three-year exclusion is required and the reasonable range for a period of exclusion. The three-year period is the period specified by the Act for an exclusion pursuant to section 1128(b)(1). Act § 1128(c)(3)(D). Therefore, a three-year exclusion is presumptively reasonable. In this case, I conclude that the aggravating factor that Petitioner's nursing license was suspended should be treated as having equal weight as the mitigating factor that Petitioner was convicted of only two offenses with no specified loss to the government. Accordingly, I conclude that a three-year period of exclusion is appropriate and within the reasonable range in this case.

## III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of three years, effective February 18, 2016.

/s/
Keith W. Sickendick
Administrative Law Judge