

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Shannon Donnell McEnany, a/k/a Shannon Donnell Smith,

Petitioner

v.

The Inspector General.

Docket No. C-11-35

Decision No. CR2332

Date: March 3, 2011

**DECISION**

This matter is before me in review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Shannon Donnell McEnany from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s determination to exclude Petitioner is based on the terms of section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). As the facts of this case mandate the imposition of a five-year exclusion, I grant the I.G.'s Motion for Summary Disposition.

**I. Procedural Background**

Petitioner Shannon Donnell McEnany was a registered pharmacy technician in the state of Iowa and in 2009 worked at Walgreens Pharmacy. On July 30, 2009, Petitioner was charged by Information in Iowa District Court for Polk County, Iowa with one count of obtaining or attempting to obtain a prescription drug by fraud, deceit, misrepresentation, or subterfuge in violation of IOWA CODE §§ 124.401(1)(c)(8), 155A.24, and 155A.23. Represented by counsel, on September 14, 2009 Petitioner entered a plea of guilty to the charge which plea was accepted by the District Court. Petitioner appeared with counsel

before the District Court on October 26, 2009, and the sentencing judge entered an order of deferred judgment with supervised probation for five years.

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 September 30, 2010 the I.G. notified Petitioner that she was being excluded pursuant to the terms of section 1128(a)(3) of the Act for the mandatory minimum period of five years.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action by letter dated October 10, 2010. I convened a telephonic prehearing conference on November 10, 2010, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing those issues. By Order of November 10, 2010 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 11, 2011.

The evidentiary record on which I decide the issues before me comprises eight exhibits. The I.G. proffered six exhibits marked I.G. Exhibits 1 through 6 (I.G. Exs. 1 through 6). Petitioner proffered two unmarked exhibits which I have designated as Petitioner's Exhibits 1 and 2 (P. Exs. 1 and 2). All proffered exhibits are admitted without objection.

## **II. Issues**

The factual and legal issues before me are limited to those listed 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)(3) of the Act; and
2. Whether the length of the proposed period of exclusion is unreasonable.

The controlling authorities require that both issues be resolved in favor of the I.G.'s position. Because her predicate conviction has been established, there is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act. A five-year term of exclusion is the minimum 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)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), requires, in pertinent part, the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of a criminal offense under

federal or state law, which occurred after August 21, 1996, and relates to the delivery of a health care item or service under title XVIII of the Act (the Medicare program) or any state health care program, and consists of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. The terms of section 1128(a)(3) are restated in similar language at 42 C.F.R.

§ 1001.101(c)(1). The Act defines “convicted” to include, among other things, “when a plea of guilty . . . by the individual has been accepted by a Federal, State, or local court.” Act § 1128 (i)(3); 42 C.F.R. § 1001.2. An exclusion based on section 1128(a)(3) is mandatory and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B); 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.102(a).

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) and (d). Petitioner bears the burden of proof and 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) and (c).

#### **IV. Findings of Fact and Conclusions of Law**

The following findings of fact and conclusions of law are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted.

##### **A. Findings of Fact**

1. On September 14, 2009, in the Iowa District Court for Polk County, Iowa, Petitioner Shannon Donnell McEnany, appeared with counsel and pleaded guilty to one felony charge of Obtaining or Attempting to Obtain a Prescription Drug by Fraud, Deceit, Misrepresentation or Subterfuge, in violation of IOWA CODE §§ -124.401(1)(c)(8), 155A.24, and 155A.23. I.G. Ex. 2, at 1.
2. Final adjudication of guilt and judgment of conviction based on that plea of guilty were imposed on Petitioner in the District Court on September 14, 2009. I.G. Ex. 2, at 1-2.
3. The felony criminal offense to which Petitioner pleaded guilty was based on conduct relating to fraud, was in connection with the delivery of a health care item or service, and occurred after August 21, 1996. I.G. Exs. 2, at 1; 5, at 3-4; 6.
4. The I.G. notified Petitioner by letter dated September 30, 2010 that she was to be excluded from participation in Medicare, Medicaid, and all federal health care programs for the mandatory minimum period of five years, pursuant to section 1128(a)(3) of the Act. I.G. Ex. 1.

5. Acting *pro se*, Petitioner perfected her appeal from the I.G.'s action by filing a timely request for hearing by letter dated October 10, 2010.

## **B. Conclusions of Law**

6. By reason of Petitioner's conviction, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

7. 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. Act § 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.102(a).

8. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, it is therefore not unreasonable. Act § 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

9. There are no disputed issues of material fact before me and summary disposition is appropriate in this matter. 42 C.F.R. § 1005.4(b)(12); *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992).

## **V. Discussion**

The four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, or the felony offense must have been with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the felonious conduct must have occurred after August 21, 1996. *Andrew D. Goddard*, DAB No. 2032 (2006); *Kenneth M. Behr*, DAB No. 1997 (2005); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Jeremy Robinson*, DAB No. 1905 (2004); *Breton Lee Morgan, M.D.*, DAB CR1913 (2009); *Wendi Mueller*, DAB CR1478 (2006); *Theresa A. Bass*, DAB CR1397 (2006); *Michael Patrick Fryman*, DAB CR1261 (2004); *Golden G. Higgwe, D.P.M.*, DAB CR1229 (2004); *Thomas A. Oswald, R.Ph.*, DAB CR1216 (2004); *Katherine Marie Nielsen*, DAB CR1181 (2004).

Petitioner does not deny that she was convicted of a felony offense. Petitioner does not dispute the relation of the conduct underlying her conviction to fraud or theft and its

nexus to the delivery of health care items or services. Petitioner does not dispute that the felonious conduct occurred after August 21, 1996. In summary, Petitioner does not argue that her felony conviction is insufficient to satisfy the four essential elements set out above. Request for Hearing (RFH) at 1; Petitioner's Answer Brief (P. Ans. Br.). Moreover, those four essential elements are demonstrated in the District Court records before me. I.G. Exs. 2, 3, 6. Therefore, as Petitioner has conceded the existence of all four of these essential elements, I need not discuss them at length in this decision.

Petitioner admits here what she confessed in District Court: while working as a pharmacy technician at Walgreens Pharmacy she obtained a prescription drug by fraud and theft, and diverted the drug for her own use. She admits that she fraudulently ordered the prescription drug Lortab, a controlled substance, from a vendor while employed at the pharmacy. RFH at 1; P. Ans. Br.; I.G. Ex. 2. Petitioner's actions resulted in her being charged and subsequently convicted of a Class C Felony related to obtaining a controlled substance by fraud. Petitioner's conviction is sufficient to support an exclusion under section 1128(a)(3). The requisite nexus between Petitioner's criminal offense and the delivery of a health care item or service has been well-established. Theft of drugs by an employee from an employer constitutes theft in connection with the delivery of a health care item. *Kevin J. Bowers*, DAB No. 2143 (2008); *Erick D. DeSimone, R. Ph.*, DAB No. 1932, at 3; *Andrew D. Goddard*, DAB No. 2032. The actions underlying Petitioner's conviction occurred after August 21, 1996 (from May 2009 through July 7, 2009). I.G. Ex. 6.

Although Petitioner does not challenge the factual and legal bases for her exclusion, she asks for a "second chance." Petitioner points out that her exclusion will impede her ability to work in certain occupations, and will thus severely limit her ability to meet the terms of the Stipulation and Consent Order she entered into with the Iowa Board of Pharmacy (Pharmacy Board) in order to settle a disciplinary proceeding before the Pharmacy Board which was based on the same actions which are the basis of the I.G.'s exclusion. P. Ans. Br.; P. Ex. 2, ¶ 8. I cannot provide Petitioner with the relief she seeks as the exclusion is statutorily-mandated and neither the I.G. nor I have been granted the authority or discretion to do as Petitioner asks.

Last, Petitioner discusses the alleged ineffectiveness of the attorney she retained in the criminal proceeding, and complains of other purported actions related to her criminal trial and conviction. I cannot look behind Petitioner's criminal conviction and the representation she received during her criminal proceedings — federal regulations explicitly preclude such collateral attacks on a conviction. 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380, at 8 (1993).

The five-year period of exclusion proposed in this case is the minimum required by section 1128(c)(3)(B) of the Act. As a matter of law, it is not unreasonable, and neither

the Departmental Appeals Board nor I can reduce it. 42 C.F.R. § 1001.2007(a)(2); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *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 and unambiguous. They support summary disposition as a matter of settled law. The Decision issues accordingly.

## **VII. Conclusion**

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G's exclusion of Petitioner Shannon Donnell McEnany 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)(3) of the Act, is sustained.

\_\_\_\_\_  
/s/  
Richard J. Smith  
Administrative Law Judge