

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Melissa Ruth Hubbard,)	
a/k/a Melissa Ruth Walters,)	Date: January 12, 2010
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-675
)	Decision No. CR2055
The Inspector General.)	
_____)	

DECISION

This matter is before me in review of the determination by the Inspector General (I.G.) to exclude Petitioner *pro se* Melissa Ruth Hubbard, also known as Melissa Ruth Walters, from participation in Medicare, Medicaid, and all other federal health care programs. The I.G. relies on the mandatory authority to do so conveyed to him by section 1128(a)(4) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(4). The predicate for the I.G.’s action is Petitioner’s conviction of conspiracy to distribute and possess with intent to distribute more than 50 grams of methamphetamine. The I.G. has filed a Motion for Summary Disposition.

The undisputed material facts in this case support the I.G.’s imposition of the exclusion. The I.G. has set the period of exclusion at five years, the minimum period of exclusion required by law. For those reasons, I grant the I.G.’s Motion for Summary Disposition.

I. Background

Petitioner *pro se* Melissa Ruth Hubbard was licensed as a Registered Nurse in the State of Kansas in June 2005. *See* I.G. Ex. 4. On June 30, 2009, the I.G. notified Petitioner that he had determined to exclude her from participation in Medicare, Medicaid, and all other federally funded health care programs because she had been convicted of a criminal offense described at section 1128(a)(4) of the Act.

On August 17, 2009, Petitioner perfected her appeal of the I.G.'s action by her *pro se* letter. On September 21, 2009, I held a prehearing conference as required by 42 C.F.R. § 1005.6(a). My September 22, 2009 Order summarizes the discussions held in the conference and contemplated that this case could be resolved by summary disposition on the parties' briefs and documentary exhibits. The cycle of briefing and this record closed for purposes of 42 C.F.R. § 1005.20(c) on December 22, 2009.

The I.G. proffered seven proposed exhibits, I.G. Exs. 1-7. Petitioner proffered four proposed exhibits, P. Exs. 1-4. In the absence of objection from either party, all proffered exhibits have been admitted to the record on which I decide this case.

II. Controlling Statutes and Regulations

Section 1128(a)(4) of the Act, 42 U.S.C. § 1320a-7(a)(4), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of “[a]ny individual or entity that has been convicted for an offense which occurred . . . [after August 21, 1996] . . . under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.” The terms of section 1128(a)(4) are restated somewhat more broadly in regulatory language at 42 C.F.R. § 1001.101(d).

The Act defines “convicted” as including those circumstances: “(1) when a judgment of conviction has been entered against the individual . . . by a Federal . . . court;” or “(2) when there has been a finding of guilt against the individual . . . by a Federal . . . court;” or “(3) when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal . . . court . . .”; Act § 1128(i)(1)-(3), 42 U.S.C. §§ 1320a-7(i)(1)-(3). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(4) 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).

III. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues before me are limited to those noted 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)(4) of the Act; and
2. Whether the proposed period of exclusion is unreasonable.

The I.G.'s position on both issues is correct. Section 1128(a)(4) of the Act supports Petitioner's exclusion from all federal health care programs. Petitioner's five-year exclusion is the minimum period established by section 1128(c)(3)(E) of the Act, 42 U.S.C. § 1320a7(c)(3)(E), and is therefore reasonable as a matter of law.

B. Findings of Fact and Conclusions of Law

1. *Petitioner's exclusion is mandated by section 1128(a)(4) of the Act because Petitioner was convicted of a criminal offense related to the unlawful distribution of a controlled substance.*

The essential elements necessary to support an exclusion based on section 1128(a)(4) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the criminal offense must have been a felony; (3) the felony conviction must have been for conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; and (4) the felonious conduct must have occurred after August 21, 1996. *Thomas Edward Musial*, DAB No. 1991 (2005); *Russell A. Johnson*, DAB CR1378 (2005); *Gerald A. Levitt, D.D.S.*, DAB CR1272 (2005); *Robert C. Richards*, DAB CR1235 (2004).

In this case, those elements are established, and Petitioner's exclusion is mandated, by the facts underlying her conviction of a criminal offense that occurred in 2006 and was related to the unlawful distribution of a controlled substance, in the United States District Court for the District of Kansas. I.G. Ex. 1.

The evidence establishes that on August 25, 2008, based on her negotiated guilty plea, Petitioner was convicted of "conspiracy to distribute and possess with intent to distribute more than 50 grams of methamphetamine," in violation of 21 U.S.C. § 846, the Federal statute specifically forbidding drug-related conspiracy. I.G. Ex. 2, at 1; *see also* I.G. Ex. 7. Petitioner's plea was in response to the first count of an Indictment charging that between June 1, 2006 and June 20, 2007, thirteen defendants, including Petitioner, knowingly and unlawfully combined, conspired, and agreed with each other and with others to commit the substantive offense of distribution and possession with intent to distribute more than 50 grams of methamphetamine, a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(viii). I.G. Ex. 5, at 2. That substantive offense was a felony, and because it was, Petitioner's part in the conspiracy to commit the substantive offense was a felony as well. 21 U.S.C. § 846.

The guilty plea was based on the following facts. On or about December 13, 2006, a cooperating witness, working with law enforcement officers, arranged to buy methamphetamine from J. Garrod, one of the thirteen conspirators charged in the Indictment. I.G. Ex. 6, at 2; I.G. Ex. 5, at 1. Garrod accompanied the cooperating witness to the home of Petitioner and her husband B. D. Hubbard, Jr., where the

cooperating witness paid Garrod \$1200. Garrod collected the methamphetamine from the Hubbards' kitchen table. Petitioner, her husband, and the couple's small child were present during the transaction. I.G. Ex. 6, at 2. Petitioner and her husband received compensation in the form of drugs and cash for the use of their house as a "stash" and distribution center for the methamphetamine. I.G. Ex. 6, at 4.

Petitioner admits that she pleaded guilty to "conspiracy to distribute and possess with intent to distribute more than 50 grams of methamphetamine." She explains that she is not now licensed as a nurse in any state, but that she is currently in a consent agreement with the Kansas State Board of Nursing and has complied with that agreement. Petitioner has also taken steps to recover, including completion of a "twelve-step" program and moving to Wyoming to remove herself from the surroundings and behavior that led to her criminal behavior and conviction. She has been sober for over thirty months, and states: "A period of exclusion is well understandable. A length of five years to me is not. I have no other criminal or negligent history." P. Br. at 1-2; P. Exs. 1, 2.

However, as Petitioner acknowledges and as the evidence shows, she was convicted of a criminal offense for which exclusion is required. Pursuant to 42 C.F. R. § 1001.2007(d), the facts underlying a conviction are not reviewable in this forum. Consequently, although Petitioner's involvement may not have been as extensive as some of the other conspirators', because she was convicted of the crime, the Act mandates exclusion and the I.G. has a basis exclude her.

2. *A five-year exclusion is reasonable.*

Section 1128(c)(3)(B) of the Act mandates that an exclusion under section 1128(a)(4) of the Act be for a minimum period of five years. Accordingly, because this exclusion is for the mandatory minimum period, it is reasonable as a matter of law, and I cannot reduce it. *See also* 42 C.F.R. § 1001.2007(a)(2).

IV. Conclusion

For the foregoing reasons, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years.

/s/
Richard J. Smith
Administrative Law Judge