

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Roshele Gene Barber  
(O.I. File Number H-11-40828-9),

Petitioner

v.

The Inspector General,  
U.S. Department of Health and Human Services.

Docket No. C-11-788

Decision No. CR2499

Date: February 7, 2012

**DECISION**

Petitioner, Roshele Gene Barber, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(4)), effective September 20, 2011. There is a proper basis for Petitioner's exclusion based upon her conviction in a state court of a criminal offense committed after August 21, 1996, related to the unlawful prescription of a controlled substance. Petitioner's exclusion for the minimum period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

**I. Background**

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated August 31, 2011, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. The I.G. advised Petitioner that her exclusion was pursuant to section 1128(a)(4) of the Act based upon her felony conviction in the Superior Court of Washington for Pierce County, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance under federal or state law.

Petitioner timely requested a hearing by letter dated September 12, 2011. The case was assigned to me on September 20, 2011 for hearing and decision. A telephone prehearing conference was convened on October 12, 2011, the substance of which is memorialized in my order of the same day. During the prehearing conference, Petitioner waived an oral hearing. The parties agreed that this matter can be resolved based upon the parties' briefs and documentary evidence, and a briefing schedule was set.

The I.G. filed a brief (I.G. Brief) on November 7, 2011, with I.G. exhibits (I.G. Exs.) 1 through 8. Petitioner filed her brief (P. Br.) on December 14, 2011, with Petitioner's exhibits (P. Exs.) 1 through 4. The I.G. filed a reply on December 20, 2011. No objections have been made to my consideration of any of the exhibits offered, and I.G. Exs. 1 through 8 and P. Exs. 1 through 4 are admitted as evidence.

## **II. Discussion**

### **A. Applicable Law**

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner with rights to an Administrative Law Judge (ALJ) hearing and judicial review of the final action of the HHS Secretary (Secretary). The right to hearing before an ALJ is set forth in 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 42 C.F.R. § 1005.3. 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). In this case, Petitioner waived an oral hearing, and the parties agreed to and have submitted only documentary evidence and written argument for my consideration.

Pursuant to section 1128(a)(4) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted for an offense that 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. Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld.

Exclusion for a minimum period of five years is mandatory for any individual or entity convicted of a criminal offense for which exclusion is required by section 1128(a) of the Act. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). Pursuant to 42 C.F.R. § 1001.102(b), an individual's period of exclusion may be extended based on the presence of specified aggravating factors. Only if aggravating factors justify an exclusion of

longer than five years, are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). The I.G. does not cite any aggravating factors to extend the period of exclusion beyond the statutory minimum of five years. Thus, I cannot consider mitigating factors to reduce Petitioner's period of exclusion in this case.

Petitioner bears the burden of going forward with the evidence and the burden of persuasion on any affirmative defenses or mitigating factors. The I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b), (c). The burden of persuasion is judged by a preponderance of the evidence. 42 C.F.R. §§ 1001.2007(c), 1005.15(d). Petitioner may not obtain review of, or collaterally attack on procedural or substantive grounds, a criminal conviction or civil judgment of a federal, state, or local court or another government agency that is cited in this forum as the basis for exclusion. 42 C.F.R. § 1001.2007(d).

### **B. Issues:**

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

Whether the I.G. has a basis for excluding Petitioner 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's request for hearing was timely, and I have jurisdiction.**

**2. Petitioner's exclusion is required by section 1128(a)(4) of the Act.**

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction.

Petitioner does not deny that, on January 28, 2010, she pled guilty to one felony count of forging a prescription for hydrocodone. Petitioner does not deny that she was convicted pursuant to her guilty plea in the Superior Court of Washington for Pierce County of one count of forging a prescription in violation of Revised Code of Washington Section 69.50.403(1)(e). Petitioner does not dispute that she unlawfully prescribed hydrocodone, which is a controlled substance. Petitioner also does not deny that the offense of which she was convicted occurred on about February 18, 2009, while she was employed as a

health care assistant at Peninsula Medical Center. I.G. Exs. 2, 3, 4, 5; P. Exs. 2, 4; P.Br. at 1-6; Request for Hearing (RFH).

The evidence before me shows that the elements necessary for exclusion under section 1128(a)(4) of the Act are satisfied in this case. Petitioner was convicted of a criminal offense. The criminal offense was a felony. The felony conviction was for conduct related to the unlawful prescription of a controlled substance, and the criminal conduct occurred after August 21, 1996. Petitioner does not deny that she is subject to exclusion pursuant to section 1128(a)(4) of the Act. P. Br. at 4. Accordingly, I conclude that there is a basis to exclude Petitioner pursuant to section 1128(a)(4) of the Act.

Petitioner argues that she was compelled to plead guilty because she was a single parent of a young child and could not risk being incarcerated. P. Br. at 1. In her request for hearing, Petitioner argues that her guilty plea should never have been entered as there were significant issues as to the validity of the charge. RFH. Petitioner may not collaterally attack before me and I may not review her criminal conviction. 42 C.F.R. § 1001.2007(d). Petitioner also argues that a motion to set aside her plea and to strike her criminal conviction will be filed. RFH. However, such motions have no impact upon the decision in this case as Petitioner was convicted within the meaning of the Act when her guilty plea was accepted. Act § 1128(i). If Petitioner's conviction is ultimately reversed or vacated on appeal, retroactive reinstatement is possible pursuant to 42 C.F.R. § 1001.3005.

**3. Pursuant to section 1128(c)(3)(B) of the Act, five years is the minimum period for of exclusion under section 1128(a).**

**4. Petitioner's exclusion for five years is not unreasonable as a matter of law.**

Petitioner concedes that she is subject to exclusion, but argues that exclusion for five years is unreasonable. P. Br. at 4. Petitioner states that the Washington State Department of Health recognized mitigating factors during a proceeding before a state administrative law judge that resulted in the suspension of her credentials to practice as a health care assistant in the state for one year. Petitioner asks that I also consider the same mitigating factors. These factors include: Petitioner's potential for successful rehabilitation; Petitioner's lack of past disciplinary record; her personal circumstances that influenced her decision to enter a plea of guilty – mainly that she was a single mother of a young child; and the fact that she cooperated with the disciplining authority. P. Br. at 3-4; P. Ex. 4. I have no discretion to grant Petitioner any relief related to the duration of the period of exclusion. The five-year exclusion imposed by the I.G. is the minimum period permitted for an exclusion pursuant to section 1128(a)(4) of the Act. Act § 1128(c)(3)(B). No mitigating factors may be used to reduce the period of exclusion as no aggravating factors were used to extend the period of exclusion. 42 C.F.R. §

1001.102(c)(1)-(3). Exclusion of Petitioner for five years is required by the Act and is not unreasonable as a matter of law.

Petitioner requests that if the period of exclusion may not be shortened, that it be treated as having begun on January 28, 2010. P. Br. at 5. The Secretary's regulation provides that an exclusion is effective 20 days from the date of the I.G.'s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b). I have no discretion under the regulations to change the effective date of Petitioner's exclusion. 42 C.F.R. § 1005.4(c)(1); *Randall Dean Hopp*, DAB No. 2166, at 2-4 (2008); *Thomas Edward Musial, R.Ph.*, DAB No. 1991 (2005). Consequently, the effective date of Petitioner's exclusion is September 20, 2011, twenty days after the August 31, 2011-I.G. Notice of Exclusion. 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.

### **III. Conclusion**

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for the minimum statutory period of five years, effective September 20, 2011.

/s/

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Keith W. Sickendick  
Administrative Law Judge