

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

In the Case of:	)	
	)	
Steven Lee Ives,	)	Date: November 4, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-466
	)	Decision No. CR1861
The Inspector General.	)	
	)	

**DECISION**

This case is before me pursuant to a request for hearing filed by Steven Lee Ives, Petitioner, dated May 16, 2008, and received in the Civil Remedies Division on May 19, 2008. It is my decision to sustain the determination of the Inspector General (I.G.) to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs, for a period of five years. Additionally, I find that the five-year exclusion imposed on Petitioner as a matter of law is not unreasonable.

**I. Background**

By letter dated April 30, 2008, the Inspector General (I.G.) notified Petitioner, Steven Lee Ives, that he was being excluded from participation in the Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Social Security Act (Act) for the minimum period of five years. I.G. Exhibit (Ex.) 1, at 1. The I.G. informed Petitioner that his exclusion was imposed under section 1128(a)(3) of the Act, due to his conviction of a criminal offense (as defined in section 1128(i) of the Act) related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service or any act or omission in a health care program operated or financed by any Federal, State, or local agency. I.G. Ex. 1, at 1.

On July 1, 2008, I convened a telephone prehearing conference during which all parties agreed that there were no factual issues in dispute and the only remaining issue is whether Petitioner's conviction falls within the exclusion provisions of the Act. The parties,

therefore, agreed on a briefing schedule to address the sole issue of whether the I.G. is authorized to exclude Petitioner from participating in Medicare and other federally funded health care programs pursuant to 1128(a)(3) of the Act. Thus, I issued an order establishing briefing deadlines. Pursuant to that order, Petitioner filed a brief on July 1, 2008, but proffered no exhibits. The I.G. filed a brief on August 1, 2008, accompanied by ten proposed exhibits. These have been entered into the record as I.G. Exs. 1-10, with objection by the Petitioner to Ex. 4 and Ex.7. These objections are without merit and consequently denied. On September 15, 2008, the I.G. filed a reply brief.

It is my decision to sustain the determination of the I.G. to exclude Petitioner from participating in the Medicare, Medicaid, and all federal health care programs, for a period of five years. I base my decision on the documentary evidence, the applicable law and regulations, and the arguments of the parties. It is my finding that Petitioner was convicted of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. Additionally, I find that where the exclusion is for the five-year minimum period, no question of reasonableness as to the length of such exclusion exists.

## **II. Issues**

The issues in this case are (1) whether the I.G. had a basis upon which to exclude Petitioner from participation in the Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Act; and if so, (2) whether the length of the exclusion imposed by the I.G. upon Petitioner is unreasonable.

## **III. Applicable Law**

Section 1128(a)(3) of the Act authorizes the Secretary of Health and Human Services to exclude from participation in any federal health care program (as defined in section 1128B(f) of the Act), any individual convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(3).

An exclusion under section 1128(a)(3) of the Act must be for a minimum period of five years. Section 1128(c)(3)(B) of the Act. Aggravating factors can serve as a basis for lengthening the period of exclusion. 42 C.F.R. § 1001.102(b). If aggravating factors justify an exclusion longer than five years, mitigating factors may be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

Pursuant to 42 C.F.R. § 1001.2007, an individual or entity excluded under section 1128(a)(3) of the Act may file a request for a hearing before an administrative law judge.

#### **IV. Findings and Discussion**

The findings of fact and conclusions of law noted below, in bold face, are followed by a discussion of each finding.

**1. Petitioner's conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service justifies his exclusion by the I.G. from participation in the Medicare, Medicaid, and all other federal health care programs.**

Petitioner was a laboratory manager employed by the Buchanan County Health Center, a nursing home facility in Buchanan County, Iowa. I.G. Ex. 4, at 1. On August 10, 2005, the Petitioner was videotaped entering the health center's office and taking funds from a safe where cash was kept on-hand for the residents. The Petitioner was charged with second-degree theft and third-degree burglary. I.G. Ex. 3, at 1. On October 20, 2006, Petitioner entered an Alford plea to the charge of third-degree burglary, and the theft charge was dismissed.<sup>1</sup> I.G. Ex. 3, at 1. Petitioner was sentenced to 36 months of probation and required to pay restitution in the amount of \$1,725.00 and fines in the amount of \$875.00. I.G. Ex. 3, at 2.

In view of the above events, the I.G. informed the Petitioner on April 30, 2008, that he was being excluded for the mandatory period of five years under section 1128(a)(3) of the Act, due to his conviction of a criminal offense (as defined in section 1228(i) (42 U.S.C. 1320a-7(i)) of the Act) related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service or any act or omission in the health care program operated or financed by any federal, state, or local government agency.

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<sup>1</sup>Although the Petitioner entered an Alford Plea to the charge of burglary and the theft charge was dismissed, this conviction is sufficiently related to a criminal offense of theft. Burglary is the unlawful entry with the intent to commit theft. Additionally, the underlying conduct of the crime for which the Petitioner was convicted involved the inappropriate taking of money that belonged to nursing home residents. As part of the criminal proceedings, the court ordered the Petitioner to pay restitution in the amount of \$1725 for the funds he took belonging to those residents.

Petitioner contends that he was not convicted of an offense that “was in connection with the delivery of a healthcare item or services.” Petitioner’s Brief (P. Br.) at 5. Petitioner also argues that the money at issue lacks a “common sense connection” to a “healthcare item or service.” P. Br. at 6. This argument is without merit.

The Departmental Appeals Board (Board) has previously interpreted Section 1128(a)(3) as covering two categories of felonies. That includes those “in connection with the delivery of a health care item or service” and those “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.” *Eric D. DeSimone, R.Ph.*, DAB No. 1932, at 4 (2004).

The relevant category of felonies at issue here is the first category; those “in connection with the delivery of a health care item or service.”

The statute does not require a direct connection to exist between the offense and the delivery of a health care item or service, but only requires a “common sense analysis” between the offense and the delivery of a healthcare care item or service. *DeSimone, R.Ph.*, DAB No. 1932, at 4. The Board held that the “connection” requisite is established when the Petitioner commits a felony through access “under the guise of performing his [or her] professional responsibilities.” *DeSimone, R.Ph.*, DAB No. 1932, at 5. Furthermore, I have previously held that untrustworthy conduct relating to health care programs is sufficient in justifying an exclusion pursuant to 1128(a)(3). *William J. Arnold, M.D.*, DAB CR1058, at 3(2003) (holding the Petitioner’s fraudulent submission of disability reports was the “type of untrustworthy conduct that Congress sought to prevent” by enacting the exclusionary rules, and thus, there was a basis for excluding the Petitioner).

The Petitioner had access to the office space because of his position as laboratory manager, and he would not have known about the funds but for his employment at the nursing home. I.G. Brief (Br.) at 6. He used his position of employment to gain unauthorized access to the residents’ funds entrusted to the nursing home facility for protection. The Petitioner’s unauthorized access to these funds was an adverse action against the residents and a violation of the duty and trust confided to the Petitioner as an agent for the facility.

The Nursing Home Reform Amendments of OBRA 1987 require that nursing facilities which participate in the Medicare and or Medicaid programs "promote and protect the rights of each resident." This includes safeguarding property and funds entrusted to the facility by its residents. *See* 42 C.F.R. § 483.10 (c). Consistent with this requirement, the applicable regulations mandate that a nursing facility must “develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents

and *misappropriation of resident property.*”(emphasis added). 42 C.F.R. § 483.13 (c). In view of the statutory and regulatory provisions that set forth rigorous requirements for the protection of every aspect of a nursing home resident’s quality of life, Petitioner’s argument that his offense, theft of petty cash belonging to residents kept in a private office, had nothing to do with any health care item or *service* (emphasis supplied), is misplaced. It is thus undeniable, that the duty of a nursing facility to protect funds that it holds in trust for the benefit of its residents, is a required service of every Medicare certified facility, and therefore, Petitioner’s conviction falls squarely within the exclusion provisions of Section 1128(a)(3) of the Act. Consequently, the Secretary is authorized to exclude Petitioner from participation in any federal health care program (as defined in section 1128B(f) of the Act), due to his conviction of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(3).

## **2. Petitioner’s exclusion for a period of five years is not unreasonable.**

An exclusion under section 1128(a)(3) of the Act must be for a minimum mandatory period of five years, as set forth in section 1128(c)(3)(B) of the Act:

Subject to subparagraph (G), in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . . .

When the I.G. imposes an exclusion for the mandatory five-year period, the reasonableness of the length of exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2). Aggravating factors that justify lengthening the exclusion period may be taken into account, but the five-year term may not be shortened. Thus, as a result of Petitioner’s conviction the I.G. is required to exclude him pursuant to section 1128(a)(3) of the Act, for at least five years. I.G. Br. at 8.

## **V. Conclusion**

Petitioner’s conviction pursuant to sections 1128(a)(3) and 1128(c)(3)(B) of the Act mandate that he be excluded from Medicare, Medicaid, and all other federal health care programs, for a period of at least five years.

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/s/  
José A. Anglada  
Administrative Law Judge