

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Karen McDermott Minster,)	Date: November 24, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-652
)	Decision No. CR2031
The Inspector General.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Karen McDermott Minster, from participating in Medicare and other federally funded health care programs for a minimum of five years.

I. Background

Petitioner is a registered nurse. On June 30, 2009 the I.G. notified her that she had been excluded from participating in Medicare and other federally funded health care programs for at least five years. The statutory basis for exclusion cited by the I.G. was section 1128(a)(3) of the Social Security Act (Act).

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I established a schedule for the parties to file briefs and proposed exhibits. The I.G. filed a brief and 10 proposed exhibits which are identified as I.G. Ex. 1 – I.G. Ex. 10. Petitioner filed a brief and six proposed exhibits which are identified as P. Ex. 1 – P. Ex. 6. The I.G. filed a reply brief. Neither party has objected to my admitting any of the proposed exhibits so I receive all of them into evidence. Neither party requested that I convene an in-person hearing.

II. Issues, findings of fact and conclusions of law

A. Issue

The issue in this case is whether Petitioner was convicted of a criminal offense as is defined at section 1128(a)(3) of the Act, thereby mandating her exclusion from Medicare and other federally funded health care programs for a minimum period of five years.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading.

1. Petitioner was convicted of a criminal offense which is among those described at section 1128(a)(3) of the Act.

Among other things section 1128(a)(3) mandates the exclusion of any individual who is 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.¹ The I.G. asserts that Petitioner was convicted of such a crime because she was convicted of fraud relating to health care items or services that she perpetrated in the course of employment as a nurse on the staff of a hospital.

On June 4, 2008, Petitioner entered a plea of nolo contendere in the Court of Common Pleas of Allegheny County, Pennsylvania to a State felony offense consisting of the acquisition or obtaining of possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge, in violation of the Pennsylvania Controlled Substance, Drug, Device, and Cosmetic Act, 35 P.S. § 780-113(a)(12). I.G. Ex. 7, at 1; I.G. Ex. 9, at 2. The charge to which Petitioner entered her plea grew out of a criminal complaint that was issued against her on January 31, 2008. I.G. Ex. 5, at 1. In it Petitioner was charged with unlawfully diverting to her own use Demerol, a controlled substance, from supplies maintained at the hospital which employed her. *Id.* at 3.

The evidence relied on by the I.G. plainly describes a conviction which falls within the reach of section 1128(a)(3) of the Act. First, Petitioner's plea of nolo contendere to State criminal charges constitutes a conviction for purposes of the

¹ The section applies only to offenses occurring after August 21, 1996. There is no dispute in this case that the offense of which Petitioner was convicted occurred in 2007.

Act. Section 1128(i)(3) states that a person is convicted of a criminal offense if a court accepts a plea of nolo contendere from that individual.² The Act also defines a conviction to include an individual's entry into a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld. Act § 1128(i)(4).

Second, the crime to which Petitioner pled constitutes the crime of fraud committed in connection with the delivery of a health care item or service. The statute defining Petitioner's crime explicitly applies to:

The acquisition, or obtaining of possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge.

35 P.S. § 780-113(a)(12). Thus, in entering her plea Petitioner explicitly pleaded to a crime involving fraud under Pennsylvania State law. The crime related to the delivery of a health care item or service because of its setting and the nature of Petitioner's acts. She diverted controlled substances to her own use from a hospital supply of those drugs. She would have had no access to the controlled substances and no opportunity to divert them but for her position as a registered nurse on the hospital's staff. These controlled substances were health care items or services because they were part of the hospital's supply and because they had no legitimate purpose other than to provide medical benefit to patients of the hospital.

Petitioner argues that her conviction is not, in fact, a conviction for fraud, deception, or subterfuge. Therefore, according to her, there is no basis for excluding her pursuant to section 1128(a)(3).

Petitioner's reasoning is, first, that the elements of her crime do not constitute "fraud" as is commonly used in federal regulations, including regulations which apply to aspects of the Medicare program or under Pennsylvania State law. *See* 42 C.F.R. § 455.2. She argues that fraud must include an element of deception or misrepresentation with the intent to benefit another individual. She contends that her crime involved no deception or misrepresentation and, therefore, cannot constitute fraud. According to Petitioner, she never created or altered any documents, never misled another individual, and did not deceive another or conceal any information for any personal benefit. Petitioner argues additionally that, under Pennsylvania law, her crime of diverting controlled substances could

² A person is convicted of a criminal offense for purposes of Section 1128(a)(3) even if his or her State or federal conviction is subsequently expunged. Act § 1128(i)(1).

not amount to fraud or deception because she did not take her job at the hospital as part of a scheme to obtain controlled substances.

I find these arguments to be unpersuasive. First, they ignore the fact that Petitioner was convicted of the crime of fraud, deception or subterfuge under Pennsylvania law. The I.G.’s authority to exclude Petitioner derives from that conviction. I have no authority to now reopen it in order to decide whether the facts of Petitioner’s case would have resulted in a conviction had she gone to trial and the outcome – if unsuccessful – had been appealed through the Pennsylvania court system.

Second, Petitioner’s arguments ignore the obvious. Petitioner engaged in acts of obvious fraud and deception in order to divert controlled substances to her own use. She misused her position as a registered nurse on the staff of a hospital to gain access to and to divert controlled substances to her benefit. She could only have accomplished that diversion by commingling her unlawful actions with the performance of her official nursing duties and by deceiving her co-workers and supervisors concerning her true intent and her acts. That is fraud by any definition of the term.

2. *Petitioner’s exclusion for a minimum of five years is mandatory.*

Exclusions that are imposed pursuant to any of the subparts of section 1128(a) of the Act must be for at least five years. Act § 1128(c)(3)(B). The I.G. is required to exclude Petitioner for at least five years as a consequence of her conviction of an 1128(a)(3) offense. Consequently, the minimum five-year exclusion that the I.G. determined to impose against Petitioner is reasonable as a matter of law.

_____/s/
Steven T. Kessel
Administrative Law Judge