Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Ellen L. Morand
Docket No. A-12-17
Decision No. 2436
January 17, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Ellen L. Morand (Petitioner) appeals the September 15, 2011 decision of Administrative Law Judge (ALJ) Steven T. Kessel upholding the exclusion of Petitioner from all federal health care programs for a period of five years. *Ellen L. Morand*, DAB CR2429 (2011) (ALJ Decision). The Inspector General (I.G.) of the Department of Health & Human Services excluded Petitioner, a licensed pharmacy technician, under the mandatory exclusion provision in section 1128(a)(3) of the Social Security Act (Act)[1] based on Petitioner's conviction for felony larceny in the Lynn District Court in Essex County, Massachusetts. The ALJ upheld the exclusion, finding that Petitioner had indeed been "convicted" of the theft for the purposes of the Act when she entered an "admission to sufficient facts," and that there was an "obvious nexus" between Petitioner's theft of the money from the pharmacy where she had been employed and the delivery of a health care item or service. ALJ Decision at 2. For the reasons set forth below, we conclude that the ALJ Decision is supported by substantial evidence and is free of legal error.

Legal Background

The Act requires that the Secretary of Health & Human Services (Secretary) exclude from participation in any federal health care program:

> Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by

[1] The current version of the Act is available at http://www.socialsecurity.gov/OP_Home/ssact/ ssact.htm. On this website, each section of the Act contains a reference to the corresponding chapter and section in the United States Code.

> or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Act § 1128(a)(3).[2] For the purposes of exclusions under section 1128, the Act defines a "conviction" to include when an individual "has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." Act § 1128(i)(4). When the Secretary excludes an individual under the mandatory exclusion provisions in section 1128(a), it must be for a minimum of five years. Act § 1128(c)(B)(3).

By regulation, the I.G. enforces the mandatory exclusion provisions in the Act on behalf of the Secretary. *See* 42 C.F.R. § 1001.101. Part 1005 of 42 C.F.R. governs the procedures in I.G. exclusion cases. As necessary, we discuss the relevant provisions of this Part in our analysis below.

Case Background

The following facts are not disputed and are drawn from the record before the ALJ and the ALJ Decision. On July 8, 2010, the Lynn (Massachusetts) Police Department (LPD) charged Petitioner with four counts of felony larceny for stealing money from Eaton Apothecary, where Petitioner worked as a pharmacy technician. I.G. Ex. 4, at 4. During the investigation, Petitioner admitted to an LPD detective that she stole cash deposits from Eaton Apothecary's safe on four separate occasions. *Id.* at 3-4. Totaling the four counts, LPD charged Petitioner with stealing $8,460.20 from her employer. *Id.* at 4.

Petitioner and local prosecutors subsequently came to an agreement whereby Petitioner entered an "admission to sufficient facts" in the Lynn District Court on October 6, 2010.[3] The District Court found "[s]ufficient facts" to warrant a finding of guilty; the court then ordered Petitioner to pay $8,460.20 in restitution but deferred a finding in the case. I.G. Ex. 3, at 2-3. On July 8, 2011, the District Court dismissed with prejudice all of the larceny counts pending against Petitioner. Pet. Ex. 1, at 1.

[2] A "federal health care program" includes Medicare, Medicaid, and "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government . . . or any State health care program" that is supported in any way with funding from the federal government. Act §§ 1128B(f)(1)-(2), 1128(h).

[3] The Massachusetts Rules of Criminal Procedure permit a criminal defendant in the District Court system to enter a plea of not guilty and then "admit to sufficient facts to warrant a finding of guilty." Mass. R. Crim. P. 12(a)(2).

On April 29, 2011, the I.G. notified Petitioner that, effective May 19, 2011, she would be excluded from all federal health care programs for a period of five years. I.G. Ex. 1, at 1. The I.G. stated that its exclusion of Petitioner was based on her "felony conviction as defined in section 1128(i) (42 U.S.C. [§] 1320a-7(i)), in the Lynn District Court . . . ." *Id.* Petitioner appealed the exclusion to the ALJ, arguing that she was not "convicted" of a crime and that any theft of money from Eaton Apothecary's deposits was not "relating to health care fraud" or done "in connection with the delivery of a health care item or service." Pet. Req. for Hr'g at 1-2.

In his decision, the ALJ made two numbered Findings of Fact and Conclusions of Law (FFCL):

1. The I.G. was mandated to exclude Petitioner because she was convicted of a felony as described at section 1128(a)(3) of the Social Security Act; and
2. The length of Petitioner's exclusion is reasonable as a matter of law.

Specifically, the ALJ found that Petitioner had been "convicted" of a crime because she "entered into an arrangement that is explicitly recognized pursuant to the Act as a conviction . . . ." ALJ Decision at 3. On the issue of whether Petitioner's crime was done "in connection with the delivery of a health care item or service," the ALJ concluded that "it is obvious that on any given day some, or even most, of the funds that [Eaton Apothecary] collected were for health care items." *Id.* at 4. In reaching this conclusion, the ALJ stated that he took "notice that a pharmacy sells a wide range of items including many items that are health care items." *Id.* According to the ALJ, Petitioner's theft of money from the "pool of money collected by her employer" would necessarily include the theft of money used by customers to buy health care items. *Id.* This, the ALJ concluded, was "sufficient to establish the requisite nexus between Petitioner's crimes and health care items or services." *Id.* Petitioner timely appealed the ALJ Decision to the Board.

Standard of Review

The regulations set forth our standard of review in I.G. exclusion cases. We review a disputed issue of fact as to whether the initial decision is supported by substantial evidence on the whole record. 42 C.F.R. § 1005.21(h). Substantial evidence requires more than a mere scintilla of evidence. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Under the substantial evidence standard, the reviewer must examine the record as a whole and consider whatever in the record "fairly detracts from the weight of the evidence

relied on in the decision below." *Longwood Healthcare Center*, DAB No. 2394, at 2 (2011) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)); *see also Stacy Ann Battle, D.D.S.*, DAB No. 1843, at 3 (2002). We review a disputed issue of law as to whether the initial decision is erroneous. Section 1005.21(h).

Analysis

On appeal to the Board, Petitioner argues that the ALJ's first FFCL is erroneous for three reasons. First, she argues that the ALJ erred by concluding that her "admission to sufficient facts," the District Court's deferred finding, and the subsequent dismissal of the larceny charges against Petitioner constituted a "conviction" as defined in the Act. Second, Petitioner argues that the ALJ erred by taking judicial notice of the fact that "a pharmacy sells a wide range of items including many items that are health care items" because it is not supported by evidence in the record and because the ALJ failed to provide the parties an opportunity to comment on the appropriateness of doing so. Third, Petitioner argues that the ALJ erred by concluding that the theft of money from Petitioner's employer was done "in connection with the delivery of a health care item or service." As explained below, we reject all of Petitioner's arguments. Therefore, we affirm the ALJ Decision.

1. Petitioner's "admission to sufficient facts" and the District Court's deferred finding constitute a conviction under the plain language of the Act.

On October 6, 2010, Petitioner entered an "admission to sufficient facts" to four counts of felony larceny. The District Court entered an order for restitution against Petitioner and "continued [the case] without a finding until: 7/5/11." I.G. Ex. 3, at 2-3. The District Court subsequently dismissed the larceny charges against Petitioner on July 8, 2011. Pet. Ex. 1, at 1. Petitioner argues that this arrangement is not a "conviction" because the Massachusetts Rules of Criminal Procedure do not equate an "admission to sufficient facts" to a guilty plea. Pet. Br. at 3.

The Act defines a "conviction" to include "when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." Act § 1128(i)(4). The Board has stated that deferred adjudications and similar arrangements are included in the definition of a "conviction" because "Congress could logically conclude that it was better to exclude providers whose involvement in the criminal system raised serious concerns about their integrity and trustworthiness, even if they were not subjected to criminal sanctions for reasons of state policy." *Henry L. Gupton*, DAB No. 2058, at 7-8 (2007), *aff'd, Gupton v. Leavitt*, 575 F.Supp.2d 874 (E.D.Tenn. 2008). Citing the legislative history of section 1128(i), the Board has noted that the goals that may support a state's deferred adjudication program are distinct from the goal of Congress to protect federal

health care programs from untrustworthy individuals through mandatory exclusions. *See id.* at 7 ("The goals of criminal law generally involve punishment and rehabilitation of the offender, possibly deterrence of future misconduct . . . . Exclusions imposed by the I.G., by contrast, are civil sanctions, designed to protect the beneficiaries of health care programs and the federal fisc, and are thus remedial in nature . . . ." (footnote omitted)).

Petitioner's argument that she was not "convicted" under state law is unavailing. As the Board stated in *Carolyn Westin*, DAB No. 1381 (1993), *aff'd, Westin v. Shalala*, 845 F.Supp. 1446 (D. Kan. 1994), "[i]f there were no definition of 'convicted' in the Act, then Petitioner's arguments about whether a conviction exists . . . for state law purposes would be relevant. However, Congress has defined for the ALJ and this Board what 'convicted' means for purposes of section 1128 and that definition is binding on us." DAB No. 1381, at 6; *see also Gupton* at 11, (analyzing the legislative history of section 1128 and concluding that "[c]learly, Congress understood the definition [of conviction] to reach the situation described where no judgment of conviction is entered"). Thus, we look to the plain language of the Act, which provides that an individual is "convicted" if he or she enters into a "deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." Act § 1128(i)(4). In this case, the ALJ concluded that Petitioner "entered into precisely such an arrangement." ALJ Decision at 3. We agree.

In *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994), the Ninth Circuit emphasized that the focus in determining whether an individual has been "convicted" under the Act is to "look to the substance of the proceedings, rather than any formal labels or characterizations used by the state or by the parties." 20 F.3d. at 996. Under the Massachusetts Rules of Criminal Procedure, when the District Court accepted Petitioner's admission to sufficient facts in this case, it necessarily found that there were enough facts to warrant a finding of guilty. *See* Mass. R. Crim. P. 12(a)(2) ("In a District Court, a defendant may, after a plea of not guilty, admit to sufficient facts *to warrant a finding of guilty*." (emphasis added)); *see also Commonwealth v. Villalobos*, 437 Mass. 797, 801, 777 N.E.2d 116, 120 (Mass. 2002) ("[A]n admission to sufficient facts may lead to either an immediate conviction and sentence, or may do so during the continuance period in the event of a violation of the continuance terms. . . ."). Rather than enter a conviction at that time, however, the District Court deferred its finding, imposed a restitution order against Petitioner, and continued the case to a later date. *See* I.G. Ex. 2, at 2-3 ("Sufficient facts found but continued without a finding until: 7/5/11."). Thus, the District Court's finding of enough facts to warrant a conviction and deferral of a formal finding to that effect is quintessentially an "arrangement or program where judgment of conviction has been withheld." Act § 1128(i)(4). Accordingly, in looking at the substance of the proceeding in this case, we conclude that there was a "conviction" for the purposes of the Act.

Petitioner also contends before us that under Massachusetts law, "the defendant is entitled to withdraw the admission [to sufficient facts] after being informed of the proposed disposition." Pet. Br. at 3. According to Petitioner, this demonstrates that the District Court could not enter a conviction against Petitioner and thus, could not have withheld a judgment of conviction. *Id.* The case law cited above, however, indicates that under Massachusetts law the District Court could have entered a conviction at any time against Petitioner after the admission to sufficient facts had been accepted and if she did not comply with the restitution order. To the extent that Petitioner's contention could be construed as an argument that she was in a "deferred prosecution" program rather than a "deferred adjudication" program within the meaning of section 1128(i)(4) of the Act, we reject that argument as well. In *Marc Schneider, D.M.D.*, DAB No. 2007 (2005), we discussed *Travers* and determined that a "deferred prosecution" requires two elements: the deferral of the initiation of criminal charges, and the ability of the accused to enter or persist in a plea of not guilty and demand a trial if the agreement with the prosecutor is voided. DAB No. 2007, at 8 (discussing *Travers*, 20 F.3d at 997). In this case, LPD charged Petitioner with four counts of felony larceny on July 8, 2010 by way of a Criminal Complaint obtained in the District Court. *See* I.G. Ex. 2, at 1.[4] A District Court judge arraigned Petitioner on August 13, 2010 based on the charges in the Criminal Complaint. *Id.* at 2. There was never a delay in the initiation of charges or an agreement that such a delay would occur. Thus, this case does not even meet the first *Travers* element of a "deferred prosecution."

Additionally, Petitioner was not able withdraw her admission unilaterally. Under the Massachusetts Rules of Criminal Procedure, a defendant may unilaterally withdraw a plea or admission *only* in the very narrow circumstance where the trial court refuses to accept a sentence or disposition that had been agreed upon by prosecutors and the defendant. Mass. Crim. P. R. 12(a)(6). There is no indication in the record, nor has Petitioner ever asserted, that the trial court in this case rejected the agreed upon disposition.[5] Because under the facts of this case Petitioner could not unilaterally withdraw her admission under Massachusetts law, she also does not meet the second requirement of a deferred prosecution discussed in *Travers*.

In sum, Petitioner's "admission to sufficient facts" (coupled with the court's deferral of entering judgment) was a deferred adjudication rather than a deferred prosecution, and constitutes a "conviction" within the ambit of section 1128(i)(4).

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[4] The Criminal Complaint states that it was issued on July 7, 2010. However, the date next to the signatures on the Criminal Complaint, indicate that it was not signed until July 8, 2010.

[5] Petitioner states that "[n]oncompliance with the terms of the agreed disposition does not automatically result in a conviction on the charges, but merely *enables the Court to decide* whether to enter a finding of guilty if deemed warranted." Pet. Br. at 3 (emphasis added). This appears to show recognition by Petitioner that she could not withdraw her admission unilaterally once the District Court had accepted it.

2. The ALJ did not err by concluding that Petitioner was convicted of a crime committed in connection with the delivery of a health care item or service.

    a. *The ALJ's taking judicial notice of an adjudicative fact without affording the parties an opportunity to comment did not prejudice Petitioner.*

Petitioner argues that in making his conclusion that Petitioner's felony was "in connection with the delivery of a health care item or service," the ALJ took judicial notice of a fact that is "not supported by the record." Pet. Br. at 8. Specifically, Petitioner objects to the ALJ taking judicial notice of the fact that "a pharmacy sells a wide range of items including many items that are health care items." ALJ Decision at 4. Petitioner also contends that the ALJ erred procedurally by taking judicial notice of this fact without giving the parties an opportunity to be heard on the appropriateness of his doing so. Pet. Br. at 7. Petitioner's arguments are not persuasive.

Contrary to Petitioner's assertion, we find that substantial evidence in the record supports the "fact" of which the ALJ took judicial notice. In the proceeding before the ALJ, Petitioner submitted excerpts from Eaton Apothecary's public website. The website states that "[o]ur site only shows a sample of our *medical and health product offerings* to remind you of what you may need." Pet. Ex. 2, at 1, 3 (emphasis in original). The website explains that "Eaton Apothecary also carries a wide range of feminine hygiene, baby needs, and incontinence products in all locations." *Id.* at 1. The website also asks consumers, "If we're already bringing your prescription why not replace those old nail scissors or that unhealthy looking toothbrush?" *Id.* at 3. Some of the products mentioned, including prescription medications, feminine hygiene products, and incontinence products, constitute "health care items" as described in the regulations. *See* section 1001.101(b) (describing a "health care item" as an item used by an individual "to meet his or her physical, mental or emotional needs or well being"). The website also confirms that the pharmacy sold non-health care items such as pantyhose and "hair accessories." Pet. Ex. 2, at 3. Even if the ALJ had not taken judicial notice of this fact, the ALJ could have reasonably found based on Petitioner's own exhibit that pharmacies in general, and Eaton Apothecary in particular, sell a "wide range of items including many items that are health care items." ALJ Decision at 4. Petitioner does not point to any evidence in the record or proffer any evidence that fairly detracts from the ALJ's finding. Thus, the ALJ's taking judicial notice of this "fact" did not prejudice Petitioner.

Petitioner also argues that the ALJ's failure to give Petitioner an opportunity to be heard on the appropriateness of taking judicial notice before doing so was procedural error. This argument is premised on federal case law citing Rule 201(e) of the Federal Rules of Evidence (FRE), which states that "[o]n timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court

takes judicial notice before notifying a party, the party, on request, is still entitled to be heard." However, the applicable regulations specifically provide that the ALJ is not bound by the FRE in an appeal challenging an I.G. exclusion. 42 C.F.R. § 1005.17(b).

Moreover, in I.G. exclusion appeals, the regulations further provide that the Board "will disregard any error or defect in the proceeding that does not affect the substantial rights of the parties." 42 C.F.R. § 1005.23. As previously discussed, Petitioner was not prejudiced by the ALJ taking judicial notice in this case. Accordingly, even if the ALJ's failure to give Petitioner an opportunity to be heard on the appropriateness of taking judicial notice before doing so were procedural error, we would be required under the regulations to disregard this error because it does not affect Petitioner's substantial rights.

b. *The theft for which Petitioner was convicted was in connection with the delivery of a health care item or service, as required by the Act.*

Petitioner next argues that her crime was not for "health care fraud" nor was it done "in connection with the delivery of a health care item or service" as required by the plain language of the Act. Act § 1128(c)(3); *see also* 42 C.F.R. § 1001.101(c)(1). In support of her argument that the Act requires a conviction for "health care fraud," Petitioner contends the criminal offense must involve "items or services that are paid for, in whole or in part, by governmental or private medical coverage." Pet. Br. at 8. Petitioner also argues that the I.G. has not presented evidence that shows any of the money stolen was obtained from the sale of health care items or services. *Id.* at 10-11. We disagree.

In support of her first argument, Petitioner cites solely to the title of section 1128(a)(3) -- "Felony conviction relating to health care fraud." *Id.* at 8. However, the statutory language in the body of this section does not even use the phrase "health care fraud" much less require a conviction for health care fraud in order to trigger a mandatory exclusion. Act § 1128(a)(3). General principles of statutory construction provide that the title of a statutory provision should not be read in a manner that limits the plain meaning of the statutory text. *Pa. Dep't. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (citing *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947)); *see also* Norman J. Singer, *Statutes and Statutory Construction* § 21:4 (6th ed. 2006) ("A caption is not part of a statute and cannot vary its express terms."). Moreover, the title of section 1128(a)(3) does not require a "felony conviction *for* health care fraud," but rather a "[f]elony conviction *relating to* health care fraud." *Id.* (emphasis added). Thus, even the title of the subsection does not support Petitioner's argument that she must be convicted for "health care fraud" in order for the I.G. to exclude her under the Act. As the Board recently pointed out in *Charice D. Curtis*, DAB No. 2430 (2011), the plain language of section 1128(a)(3) "encompasses felonies 'relating to' fraud and the other types of offenses listed, not just felonies that constitute fraud or one of the other listed offenses." DAB No. 2430, at 4.

Moreover, Petitioner's argument that there must be some proof of government funding for the items or services related to the crime is unsupported by the language of the Act. Section 1128(a)(3) uses the disjunctive "or" between the types of crimes that require exclusion. Specifically, the Act provides that an offense must only occur "in connection with the delivery of a health care item or service *or* 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 . . . ." Act § 1128(a)(3) (emphasis added). Therefore, section 1128(a)(3) requires exclusion for either a crime committed "in connection with the delivery of a health care item or service" or a crime that involved an act or omission in a government-funded health care program. *See Breton Lee Morgan, M.D.*, DAB No. 2264, at 6 (2009) ("[T]he use of the disjunctive 'or' means that only one of the listed requirements in a series needs to be satisfied, not every one."). Congress's use of "or" between these two types of crimes is a clear indication that it did not intend mandatory exclusions to occur only for crimes committed against a government-funded health care program.

We also reject Petitioner's secondary argument that the theft of money from her employer's evening deposits was not done "in connection with the delivery of a health care item or service." For a crime to be committed "in connection with the delivery of a health care item or service," the conduct underlying the criminal offense does not necessarily have to involve actual delivery (or the interruption of same) of a health care item or service to the patient or beneficiary. In *Curtis*, the Board concluded that section 1128(a)(3) of the Act does not limit exclusions "to offenses involving the actual delivery of healthcare but broadly covers offenses '*in connection with* the delivery of a health care item or service.'" DAB No. 2430, at 5 (emphasis in original). Thus, in *Curtis*, the Board concluded that an administrator's fraudulent theft of money from her employer, a provider of in-home nursing services, was connected to the delivery of health care items or services because the money "could have otherwise been used to fund the provision of health care items or services." *Id.* The Board also noted in *Curtis* that the administrator's position as a manager with access to her employer's finances added to the "common-sense connection" between her criminal action and the delivery of a health care item or service. *Id.* Additionally, in *Jack W. Greene*, DAB No. 1078 (1989), the Board wrote that offenses "are also 'related' because they concern acts that *directly and necessarily follow* under the health care program from the delivery of the item or service." DAB No. 1078, at 7 (emphasis added). While *Greene* addressed an exclusion under section 1128(a)(1), the Board's later decisions have determined that "related to" and "in connection with" are to be interpreted in the same way. *See, e.g.*, *Mark B. Kabins, M.D.*, DAB No. 2410, at 8 (2011). Moreover, in *Kenneth M. Behr*, DAB No. 1997 (2005), the Board concluded that the *attempted* disruption of the delivery of a health care item or service was sufficiently connected thereto. DAB No. 1997, at 9. In *Behr*, the Board

noted that "financial misconduct generally is not part of the actual delivery of the item or service, but is related, for example, to payment for (or misappropriation of) an item or service that was delivered, that was fraudulently claimed to have been delivered, or that was intended to be delivered." *Id.*

Here, Petitioner stole the evening deposits out of the safe of her employer, Eaton Apothecary. The evening deposits in the safe represented several days of revenue that Eaton Apothecary had obtained for the sale of items it offers, which, as previously discussed, include items that are health care items. I.G. Ex. 4, at 2.[6] The ALJ found that at least some of the proceeds obtained by Eaton Apothecary "on any given day" consisted of revenue from the sale of health care items or services. ALJ Decision at 4. This finding is supported by substantial evidence in the record. For example, the LPD police report contains statements from Eaton Apothecary's manager, who told investigators that the pharmacy's "financial transactions are mostly insurance related." I.G. Ex. 4, at 2. The ALJ could have reasonably inferred that these "insurance related" transactions were for items or services covered by health insurance and that at least some portion of the evening deposits stolen by Petitioner consisted of money obtained from the sale of health care items or services.

Additionally, while the record does not indicate whether Petitioner oversaw any of Eaton Apothecary's finances at a managerial level, she had access to the safe where the evening deposits were kept before being transferred to the bank by virtue of her position as a licensed pharmacy technician at Eaton Apothecary. *Id.* Because Eaton Apothecary provides the public with health care items and services, Petitioner's theft of funds from Eaton Apothecary's safe diverted money that could have otherwise been used for the furnishing of these health care items or services. Taken together, these facts are sufficient to demonstrate a common-sense connection between Petitioner's theft of the evening deposits and the delivery of a health care item or service within the scope of section 1128(a)(3). *See Curtis* at 5 (concluding that the nature of the employer's business as well as the nature of the administrator's position demonstrated a "common-sense connection" to the delivery of health care items or services).

As previously discussed, the ultimate goal of the mandatory exclusion provisions is to protect federal health care programs from untrustworthy individuals. *Schneider* at 8. Petitioner's criminal conduct in this case – the theft of money from a pharmacy where she was employed – demonstrates untrustworthiness in an environment where the provision of health care items and services is commonplace. Indeed, Petitioner does not

[6] Petitioner appears to argue before us that the ALJ should not have admitted I.G. Exhibit 4, the LPD Incident Report, because it constitutes multiple levels of hearsay. *See* Pet. Br. at 10. As we noted before, the ALJ is not bound by the FRE and may, therefore, admit hearsay so long as it is not unreliable. 42 C.F.R. § 1005.17(b). Other than stating that the document was not "properly authenticated," Petitioner has not demonstrated how I.G. Exhibit 4 is unreliable. Thus, we do not find that the ALJ's admission of this exhibit into the record was erroneous.

argue otherwise. Thus, the I.G. was obligated to exclude her from all federal health care programs for the mandatory minimum of five years to protect the integrity of these programs.

Conclusion

For all of the foregoing reasons, we affirm the ALJ Decision.

/s/
Judith A. Ballard

/s/
Sheila Ann Hegy

/s/
Stephen M. Godek
Presiding Board Member