

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Stacy Ann Miller,)	Date: October 07, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-539
)	Decision No. CR2018
The Inspector General.)	
_____)	

DECISION

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

I. Background

Petitioner is a nurse. On April 30, 2009 the I.G. notified Petitioner that she was being excluded from participating in Medicare and other federally funded health care programs. The reason stated by the I.G. for excluding Petitioner was that she had been convicted of a criminal offense as is described by sections 1128(a)(3) and 1128(a)(4) of the Social Security Act (Act). The I.G. advised Petitioner that she was being excluded for at least five years, the minimum period provided by the Act for an exclusion that is imposed pursuant to either section 1128(a)(3) or 1128(a)(4).

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I ordered the parties to submit proposed exhibits and briefs. They complied with my pre-hearing order. The I.G. filed ten proposed exhibits which he identified as I.G. Ex. 1 – I.G. Ex. 10. Petitioner filed three proposed exhibits which she identified as P. Ex. 1 – P. Ex. 3. I am receiving these exhibits into evidence. Neither party requested that I convene an in-person hearing.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Petitioner was convicted of crimes that are described by either section 1128(a)(3) or 1128(a)(4) of the Act; and
2. The five-year exclusion imposed by the I.G. is mandated by law.

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. It is undisputed that Petitioner was convicted of a crime that is described at sections 1128(a)(3) and 1128(a)(4) of the Act.

Petitioner has not challenged the I.G.'s determination that she was convicted of a felony that is described at sections 1128(a)(3) and 1128(a)(4) of the Act. Moreover, the undisputed evidence offered by the I.G. proves that Petitioner was convicted of section 1128(a)(3) and 1128(a)(4) offenses, and as a consequence, her exclusion is mandated by law.

Section 1128(a)(3) mandates the exclusion of any individual who is convicted of a federal or a State felony occurring after August 21, 1996, 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 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. The section thus plainly covers felonies consisting of fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct committed in connection with the delivery of a health care item or service. Section 1128(a)(4) mandates the exclusion of any individual who is convicted of a felony occurring after August 21, 1996, relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

The evidence in this case establishes that on July 7, 2008, Petitioner pled guilty in a Pennsylvania State court to felony charges that she acquired or obtained possession by misrepresentation, fraud, forgery, deception, or subterfuge, of controlled substances consisting of Hydrocodone, a Schedule III controlled substance, and Alprazolam, a Schedule IV controlled substance, with the intent to

deliver these controlled substances to others. I.G. Ex. 2, at 1; I.G. Ex. 5, at 2. The conviction was of an offense that fell within the reach of section 1128(a)(3) of the Act because it constituted fraud in connection with the delivery of a health care item or service. The criminal acts engaged in by Petitioner involved obtaining controlled substances fraudulently, with the intent to consume these drugs or to give them to another individual. I.G. Ex. 9, at 34-35; I.G. Ex. 3, at 4-5. The conviction also was of an offense that fell within the reach of section 1128(a)(4) because it involved the unlawful distribution of controlled substances. *Id.*

2. Petitioner's five-year exclusion is mandated by law.

The I.G. determined to exclude Petitioner for at least five years. Exclusions for offenses that fall within the reach of sections 1128(a)(3) or 1128(a)(4) of the Act must be for a minimum of five years. Act, section 1128(c)(3)(B). I am without authority to address the reasonableness of Petitioner's exclusion inasmuch as it is for the statutory minimum period.

Petitioner makes several arguments to challenge the length of the exclusion. Essentially, she contends that there are extenuating circumstances in her case consisting of: the allegedly small quantity of controlled substances that she misdirected; her withdrawal from the practice of nursing before she pled guilty; and her voluntary post-conviction submission to drug tests. Petitioner's brief, at 1. But, even assuming these assertions to be true, they offer no basis for me to reduce the length of the exclusion in this case. The five years that the I.G. imposed is the minimum period and I have no authority to reduce the exclusion to less than five years.

Petitioner also argues that the exclusion violates the United States Constitution. Petitioner's brief at 2. Petitioner does not articulate a legal basis to support this argument. However, I am without authority to consider it.

/s/
Steven T. Kessel
Administrative Law Judge