

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Trudy J. Summers, R.N.,

Petitioner,

v.

The Inspector General.

Docket No. C-12-1290

Decision No. CR2824

Date: June 13, 2013

DECISION

This matter is before me on review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Trudy J. Summers from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s determination to exclude Petitioner is based on the terms of section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). The facts of this case mandate the imposition of a five-year exclusion, and so I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner *pro se* Trudy J. Summers, R.N. is a registered nurse licensed in the State of Wyoming. I.G. Exhibit (Ex.) 3. In 2008, she was employed as a nurse at the Veterans Administration Medical Center (VAMC) in Cheyenne, Wyoming. While on duty at that facility between August 1 and December 10, 2008, she diverted unused portions of prepackaged morphine doses to her own use; part of this misconduct was made possible by Petitioner's misuse of other nurses' personal identification codes in recording the disposition of the drugs. I.G. Ex 4.

Her activities were discovered by federal authorities, but they were prosecuted by state authorities in state court. I.G. Exs. 4, 5. On February 22, 2010 Petitioner appeared with counsel in the District Court for the First Judicial District of Laramie County, Wyoming and pleaded guilty to one misdemeanor count of Acquiring a Controlled Substance by Misrepresentation, in violation of WYO. STAT. ANN. § 35-7-1033(a)(iii), and one felony count of Furnishing False Information on a Document Required to Be Kept, in violation of WYO. STAT. ANN. § 35-7-1033(a)(iv). At that same appearance, the District Court accepted Petitioner's pleas to the two charges, found her guilty of both crimes, entered its judgment of conviction, and imposed sentence. Petitioner was placed on five years' supervised probation and was ordered to pay fines, fees, and assessments totaling \$485. I.G. Exs. 4, 5, 6.

As required by the terms of section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. On July 31, 2012, the I.G. notified Petitioner that she was being excluded pursuant to the terms of section 1128(a)(3) of the Act for the mandatory minimum period of five years. I.G. Ex. 1.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action by letter dated August 14, 2012.¹ I convened a telephonic prehearing conference on November 5, 2012, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing those issues. By Order of that date I established a schedule for the submission of documents and briefs. That schedule has been modified twice, first by my Order of December 31, 2012 and most recently by my Order of March 26, 2013. All briefing is now complete, and the record in this case closed on April 30, 2013.

There are eight exhibits in this case. The I.G. proffered seven exhibits marked I.G. Exhibits 1 through 7 (I.G. Exs. 1-7), and they are admitted without objection. Petitioner filed a document from the Wyoming State Board of Nursing dated February 4, 2013, but that document was not marked as an exhibit in compliance with the Civil Remedies Division Procedures (CRDP) § 9 and paragraphs 5(e) and 10 of my Orders of December 31, 2012 and November 5, 2012. Nevertheless, I have marked and admitted it as Petitioner's Exhibit 1 (P. Ex.1).

II. Issues

The issues before me are limited to those listed at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, they are:

¹ This letter was filed electronically by Petitioner on September 16, 2012.

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(3) of the Act; and
2. Whether the length of the proposed period of exclusion is unreasonable.

Both issues must be resolved in favor of the I.G.'s position. Because her predicate conviction has been established, there is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act. A five-year term of exclusion is the minimum established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B) and is therefore not unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of “[a]ny 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 [section 1128(a)](1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.” The terms of section 1128(a)(3) are restated in similar language at 42 C.F.R. § 1001.101(c).

The Act defines “conviction” as including those circumstances “when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court,” Act § 1128(i)(1); “when there has been a finding of guilt against the individual . . . by a Federal, State, or local court,” Act § 1128(i)(2); “when a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court,” Act § 1128(i)(3); or “when the 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). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(3) is mandatory and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B); 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

IV. Findings and Conclusions

I find and conclude as follows:

1. On her accepted pleas of guilty on February 22, 2010, in the District Court for the First Judicial District of Laramie County, Wyoming, Petitioner Trudy J. Summers was found guilty of one misdemeanor count of Acquiring a Controlled Substance by Misrepresentation, in violation of WYO. STAT. ANN. § 35-7-1033(a)(iii), and one felony count of Furnishing False Information on a Document Required to Be Kept, in violation of WYO. STAT. ANN. § 35-7-1033(a)(iv). The felonious conduct to which Petitioner pleaded guilty occurred on or about December 7, 2008. I.G. Exs. 4, 5, 6.
2. Judgment of conviction was entered against Petitioner and she was sentenced on her guilty pleas in the District Court on that same day, February 22, 2010. I.G. Ex. 6.
3. The judgment of conviction, finding of guilt, and accepted pleas of guilty described above in Findings 1 and 2 constitute a “conviction” within the meaning of sections 1128(a)(3) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.
4. There is a nexus and a common-sense relationship between the felony offenses of which Petitioner was convicted, as noted above in Findings 1, 2, and 3, and fraud in connection with the delivery of a health care item or service. I.G. Exs. 4, 5.
5. Petitioner’s conviction as noted above in Findings 1, 2, 3, and 4 constitutes a basis for the I.G.’s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Act § 1128(a)(3); 42 U.S.C. § 1320a-7(a)(3).
6. The five-year period of Petitioner’s exclusion is the mandatory minimum period provided by law, and is therefore not unreasonable. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).
7. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, *or* the felony offense must have been 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; and (4) the felonious conduct must have occurred after August 21, 1996. *Andrew D. Goddard*, DAB No. 2032 (2006);

Kenneth M. Behr, DAB No. 1997 (2005); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Jeremy Robinson*, DAB No. 1905 (2004); *Breton Lee Morgan, M.D.*, DAB CR1913 (2009); *Morganna Elizabeth Allen*, DAB CR1479 (2006); *Theresa A. Bass*, DAB CR1397 (2006); *Michael Patrick Fryman*, DAB CR1261 (2004); *Golden G. Higgwe, D.P.M.*, DAB CR1229 (2004); *Thomas A. Oswald, R.Ph.*, DAB CR1216 (2004); *Katherine Marie Nielsen*, DAB CR1181 (2004).

All four essential elements appear plainly in the records of the state court. Petitioner's conviction is shown by I.G. Exs. 5 and 6, and the crime proscribed by WYO. STAT. ANN. § 35-7-1033(a)(iv) is a felony under Wyoming law. The court records show that the conduct on which her conviction was based occurred in 2008, well after the 1996 benchmark date. Her specific acts are fairly characterized as fraud, theft, or embezzlement, inasmuch as while on duty as a nurse at the VAMC facility, she diverted unused portions of morphine to her own use and misused other nurses' personal identification codes in recording the disposition of the drugs, thereby concealing her own misconduct. The nexus of this misconduct to the delivery of a health care item or service in the health care program operated and financed by the VAMC is obvious.

Petitioner does not contest the I.G.'s proof of the four essential elements, and concedes that she is in fact subject to exclusion. What she seeks in this appeal is a reduction in the length of her exclusion, which as proposed by the I.G. is the five-year period established by statute as the mandatory minimum required by section 1128(c)(3)(B) of the Act. As a matter of law the proposed five-year period is not unreasonable, and neither the Board nor I can reduce it to anything less than five years. 42 C.F.R. § 1001.2007(a)(2); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

Petitioner correctly points out that the I.G. waited 30 months after her conviction to begin exclusion proceedings. When measured against the five-year period of exclusion that the I.G. seeks to impose the delay is significant, although her nursing license remains suspended. P. Ex. 1. But the beginning date of Petitioner's exclusion is established by operation of law as 20 days from the date of the I.G.'s July 31, 2012 notice letter. Section 1128(c)(1) of the Act, 42 U.S.C. § 1320a-7(c)(1); 42 C.F.R. § 1001.2002(b). I have no authority to change that date. *Randall Dean Hopp*, DAB No. 2166 (2008); *Lisa Alice Gantt*, DAB No. 2065 (2007); *Kailash C. Singhvi, M.D.*, DAB No. 2138 (2007).

I note once more that Petitioner appears here *pro se*. Because of that I have been guided by the Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991). I have searched all of Petitioner's pleadings for any arguments or contentions that might raise a valid, relevant defense to the I.G.'s Motion, but have found nothing that could be so construed.

Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law, and this Decision issues accordingly.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Trudy J. Summers, R.N. from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, pursuant to the terms of section 1128(a)(3) of the Act, is SUSTAINED.

/s/
Richard J. Smith
Administrative Law Judge