

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

|                             |   |                      |
|-----------------------------|---|----------------------|
| _____                       | ) |                      |
| In the Case of:             | ) |                      |
|                             | ) |                      |
| Dana R. Duke, Inmate SPN/ID | ) |                      |
| 9809/183021, (O.I. File No. | ) | Date: March 20, 2008 |
| 4-07-40648-9),              | ) |                      |
|                             | ) |                      |
| Petitioner,                 | ) | Docket No. C-08-76   |
|                             | ) | Decision No. CR1761  |
| - v. -                      | ) |                      |
|                             | ) |                      |
| The Inspector General.      | ) |                      |
| _____                       | ) |                      |

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Dana R. Duke, from participating in Medicare and other federally funded health care programs for a period of 13 years.

**I. Background**

On August 31, 2007 the I.G. notified Petitioner that she was being excluded from participating in Medicare and other federally funded health care programs. The I.G. told Petitioner that her exclusion was mandated by her conviction of a criminal offense as is described at section 1128(a)(4) of the Social Security Act (Act). Section 1128(a)(4) requires 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 I.G. also notified Petitioner that the length of her exclusion – 13 years – was based on the presence of certain factors that the I.G. identified as aggravating.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference by telephone at which I ordered the parties to file briefs and exhibits addressing the issues of the case. I told the parties that each of them could request that I convene a hearing in person and that I would convene one if the

party requesting the hearing was able to show that there existed relevant evidence in the form of testimony that did not duplicate something contained in a document.

Both the I.G. and Petitioner filed briefs. Neither party requested an in-person hearing. The I.G. filed six proposed exhibits which he identified as I.G. Ex. 1-I.G. Ex. 6. Petitioner filed no proposed exhibits and did not object to my receiving into evidence any of the I.G.'s proposed exhibits. Consequently I receive into evidence I.G. Ex. 1-I.G. Ex. 6.

## **II. Issue, findings of fact and conclusions of law**

### **A. Issue**

Petitioner concedes that she was convicted of an offense as is described at section 1128(a)(4) of the Act. The undisputed facts of this case are that on December 6, 2006 Petitioner pled guilty in a Kentucky State court to felonies consisting of: manufacturing methamphetamine; unlawful possession of a controlled substance (methamphetamine); and possession of drug paraphernalia. I.G. Ex. 2; I.G. Ex. 3. These are all offenses occurring after August 21, 1996 that relate to the unlawful manufacture and distribution of a controlled substance. Therefore, the only issue that I may hear and decide is whether the length of Petitioner's exclusion is reasonable.

### **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. An exclusion of at least five years is mandated by law.***

The Act requires that any exclusion imposed pursuant to section 1128(a)(4) be for a minimum of five years. Act, section 1128(c)(3)(B). Thus, the minimum exclusion that I may sustain in this case is for five years.

#### ***2. An exclusion of 13 years is reasonable.***

The remedial purpose of the Act is to protect federally funded programs and their beneficiaries and recipients from individuals who are untrustworthy. An exclusion is not imposed as punishment but in order to accomplish the Act's remedial purpose. In evaluating whether an exclusion is reasonable the ultimate question, therefore, is whether the length of the exclusion is reasonably related to the Act's remedial purpose.

There are no statutory criteria – other than the need to protect programs and program beneficiaries and recipients from untrustworthy individuals – for determining what is reasonable beyond the minimum five-year exclusion period. The Secretary has published regulations that establish aggravating and mitigating factors that may be considered in determining whether an exclusion of a particular length is reasonable. 42 C.F.R. Part 1001. The applicable regulation in this case is 42 C.F.R. § 1001.102(b) and (c). The aggravating and mitigating factors that are enumerated in this section function as rules of evidence in that they establish what evidence may be considered in deciding whether an exclusion is reasonable.

Evidence that relates to any of the aggravating or mitigating factors specified by the regulation is relevant to the issue of reasonableness of length. Evidence that does not relate to any of the aggravating or mitigating factors is irrelevant and may not be considered. Also, like rules of evidence, the regulation sets forth no formula for assigning weight to relevant evidence. Therefore, I must evaluate any evidence that addresses an aggravating or a mitigating factor without applying a formula for deciding what is reasonable. All relevant evidence must be considered in terms of what it says about the excluded individual's trustworthiness.

In this case there is no dispute that the I.G. established that there is evidence relating to three aggravating factors. The undisputed evidence is as follows:

- Petitioner's conviction resulted in her incarceration. 42 C.F.R. § 1001.102(b)(5). She was sentenced to a term of imprisonment for 10 years as a consequence of her conviction. I.G. Ex. 3, at 3.
- Petitioner has a prior criminal record. 42 C.F.R. § 1001.102(b)(6). Petitioner was convicted in a Kentucky State court on December 8, 2004 – two years prior to her most recent conviction – of the crime of possession of a controlled substance (methamphetamine). I.G. Ex. 5, at 1, 4.
- Petitioner was subject to another adverse action by a State board based on the circumstances that are the basis for her exclusion. 42 C.F.R. § 1001.102(b)(9). The Kentucky State Board of Nursing denied Petitioner renewal of her registered nurse's license for a minimum of three years based on her most recent conviction. I.G. Ex. 6, at 2.

In her brief Petitioner argues that she will be discharged from prison in December 2008. She avers that she has completed an intensive substance abuse program and that she has learned much from her experience. In effect, she argues that, as a consequence of her treatment she will not again abuse controlled substances.

Although I have no doubt that Petitioner's assertions are heartfelt they do not comprise mitigating evidence that I can consider pursuant to 42 C.F.R. § 1001.102(c) because they do not comport with any of the mitigating factors stated in the regulation. Moreover, I would be skeptical of those assertions even if they did comport with a mitigating factor.

The evidence in this case establishes Petitioner to be a highly untrustworthy individual. She has been convicted twice in a two year period of possession of methamphetamine, an extraordinarily dangerous substance. Furthermore, she was not simply a user of that drug, but a manufacturer and a distributor. Given that, I find an exclusion of 13 years is reasonable.

\_\_\_\_\_/s/\_\_\_\_\_  
Steven T. Kessel  
Administrative Law Judge