Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Cynthia D. Critchfield,	)	Date: September 15, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-397
	)	Decision No. CR1839
The Inspector General.	)	
	)	

DECISION

This case is before me pursuant to a request for hearing filed by Cynthia D. Critchfield, Petitioner, dated April 17, 2008, and received in the Civil Remedies Division on April 21, 2008.

I. Background

By letter dated March 31, 2008, the Inspector General (I.G.) notified Petitioner, Cynthia D. Critchfield, that she was being excluded from participation in the Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Social Security Act (Act) for the minimum period of five years. The I.G. informed Petitioner that her exclusion was imposed under section 1128(a)(3) of the Act, due to her conviction of a felony offense (as defined in section 1128(i) of the Act) 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 or any act or omission in a health care program operated or financed by any federal, State, or local agency.

On May 16, 2008, I convened a telephone prehearing conference during which Petitioner stated that her conviction did not fall within the exclusion provisions of the Act. The parties, therefore, agreed on a briefing schedule to address the sole issue of whether the Petitioner was convicted of a felony as defined by section 1128(a)(3) of the Act. Thus, I issued an order establishing briefing deadlines. Pursuant to that order, the I.G. filed a

brief on June 16, 2008, accompanied by four proposed exhibits (Exs.). These have been entered into the record as I.G. Exs. 1-4, without objection. Petitioner filed a brief on July 15, 2008, accompanied by three exhibits. These have been entered into the record as P. Exs. 1-3, without objection. On July 29, 2008, the I.G. filed a reply brief.

It is my decision to sustain the determination of the I.G. to exclude Petitioner from participating in the Medicare, Medicaid, and all federal health care programs, for a period of five years. I base my decision on the documentary evidence, the applicable law and regulations, and the arguments of the parties. It is my finding that Petitioner was convicted of a felony 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. Additionally, I find that where the exclusion is for the five-year minimum period, no question of reasonableness as to the length of such exclusion exists.

II. Applicable Law and Regulations

Section 1128(a)(3) of the Act authorizes the Secretary of Health and Human Services (Secretary) to exclude from participation in any federal health care program (as defined in section 1128B(f) of the Act), any individual convicted of a felony 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.

An exclusion under section 1128(a)(3) of the Act must be for a minimum period of five years. Section 1128(c)(3)(B) of the Act. Aggravating factors can serve as a basis for lengthening the period of exclusion. 42 C.F.R. § 1001.102(b). If aggravating factors justify an exclusion longer than five years, mitigating factors may be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

Pursuant to 42 C.F.R. § 1001.2007, an individual or entity excluded under section 1128(a)(3) of the Act may file a request for a hearing before an administrative law judge (ALJ).

III. Issue

The issue in this case is whether the I.G. had a basis upon which to exclude Petitioner from participation in the Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Act.

IV. Findings and Discussion

The findings of fact and conclusions of law noted below, in italics, are followed by a discussion of each finding.

> ***1. Petitioner was convicted of a criminal offense that was 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.***

Petitioner concedes that she has been convicted of an offense after the date of enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), under 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 operated by or financed in whole or in part by any federal, State, or local government agency, of a criminal offense. However, Petitioner contends that her conviction is not a felony under New Jersey law, and should not be considered a felony conviction pursuant section 1128(a)(3) of the Act. P. Br. at 5.

> ***2. Petitioner's conviction constitutes a felony under section 1128(a)(3) of the Act, and therefore, justifies her exclusion by the I.G. from participation in the Medicare, Medicaid, and all other federal health care programs.***

Petitioner is a pharmacist licensed by the State of New Jersey. Her license to practice pharmacy was suspended by the New Jersey Board of Pharmacy for a period of five years commencing April 18, 2007. The suspension was stayed in its entirety to be served as a period of probation, subject to conditions set forth in the Final Consent Order. P. Ex. 3. The Board suspension action was premised on Petitioner's plea of guilty to a one count indictment of health care claims fraud in the third degree, an offense under the provisions of N.J.S.A. 2C:21-4.3(c). The chronology of events leading up to the administrative suspension proceedings are recited below.

On March 2, 2004, Detective John Walker filed a complaint in the Superior Court of Burlington County, New Jersey, alleging that Petitioner:

> knowingly committed health care claims fraud as a practitioner in the course of providing professional services by causing to be made false statements of material fact on records, claims, bills or other documents for payment or reimbursement for health care services. Specifically, by filling fifty seven (57) fraudulent prescriptions for herself, in her own name, while working as a licensed pharmacist at the Shop Rite [pharmacy] in

> Medford Township on diverse dates between August 22, 2001 and August 29, 2003.

I.G. Ex. 2, at 1.

The complaint was based on an affidavit of probable cause subscribed to by detective Walker of the Burlington County prosecutor's office. His affidavit was supported by an investigative report provided by Investigator Richard Lizzano. During the course of the investigation, Mr. Lizzano interviewed Dr. Steven A. Scuderi, M.D. and his assistant Mrs. Mary Beth Carroll-Allain., Nurse Practitioner. Dr. Scuderi provided a sworn statement in which he stated that between March 29, 2001 and September 8, 2002, Petitioner caused forty-four (44) unauthorized prescriptions, including refills, to be filled in her name, using the doctor's name as author of the prescriptions. Nurse practitioner, Carroll-Allain also signed a notarized statement in which she stated that between April 21, 2002 and December 17, 2002, Petitioner caused thirteen (13) unauthorized prescriptions including refills, to be filled in Petitioner's name using the nurse practitioner's name as author of the prescriptions. I.G. Ex. 2, at 2.

A review of Petitioner's prescription insurance plan payment records, from August 22, 2001 until August 29, 2003, revealed that the insurer paid $34,481.47 for prescriptions, including refills, that were not authorized by Dr. Scuderi or by nurse practitioner Carroll-Allain. I.G. Ex. 2, at 2.

On February 28, 2006, a Grand Jury of the State of New Jersey, Burlington County, returned an indictment against Petitioner, charging among other things, that she knowingly committed health care claims fraud, a second degree offense under the provisions of N.J. S.A. 2C:21-4.3(a). I.G. Ex. 3. Through plea bargaining the indictment was amended on October 23, 2006, to allege one count of health care claims fraud in the third degree, a violation of N.J.S.A. 2C:21-4.3(c). P. Ex. 3, at 2-3; P. Ex. 2, at 3-4.

On January 5, 2007, Petitioner was sentenced to probation for a period of five years with the following conditions:

- Petitioner was to serve 364 days in the Burlington County jail, the imposition of the jail term to be suspended until termination of the probation period.

- Jail term would be vacated if probation was successfully completed.

- Petitioner was to pay restitution in the amount of $34,461.88 to Aetna U.S. Health Insurance.[1]

- Petitioner waived her right to appeal.

- Petitioner was to provide a DNA sample and defray the cost of testing.

I.G. Ex. 4, at 1.

Petitioner contends that the I.G. does not have a legal basis to exclude her from participating in federal health care programs, because the mandatory exclusion provision of the Social Security Act does not apply. She asserts that the offense to which she pled guilty is not a felony under New Jersey State Law, and should therefore not be considered a felony under the mandatory exclusion provision of the Act. P. Br. at 2.

Section 1128(a)(3) of the Act provides, in relevant part -

> (a) The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> * * *
>
> (3) FELONY CONVICTION RELATED TO HEALTH CARE FRAUD - Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act

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[1] In her allocution at sentencing, Petitioner explained that the conduct that gave rise to the indictment occurred when she filled two prescriptions for her daughter on two occasions. One instance concerned the refill of a prescription on October 12, 2002, and the other when she refilled a prescription on November 14, 2002. P. Ex. 2, at 8. However, the court ordered restitution of $34,461.88, based on the 57 unlawfully filled prescriptions mentioned in detective Walker's complaint. These 57 prescriptions were filled, for the most part, during a period prior to the two incidents mentioned by Petitioner during the guilty plea hearing. *See* I.G. Ex. 2, at 2. I also note that whereas Petitioner also stated in her allocution that she falsified Dr. Simmer's authorization, detective Walker did not mention that physician in his complaint, but rather Dr. Scuderi and nurse practitioner Carroll-Allain. *See* P. Ex. 2, at 8-9.

> or omission in a health care program . . . operated by or financed in whole or 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.

To prevail, the I.G. must show that:

- Petitioner was convicted of a felony for an offense that occurred after the enactment of the Health Insurance Portability and Accountability Act of 1996, related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct and,

- that the conviction was in connection with the delivery of a health care item or service; or,

- that the conviction was with respect to any act or omission in a health care program . . . operated by or financed in whole or part by any federal, State or local government agency.

Petitioner does not dispute that she has been convicted of an offense which occurred after the date of the enactment of the HIPAA, nor that the offense was in connection with the delivery of a health care item or service under federal or State law. P. Br. at 5. The sole remaining issue is whether Petitioner was convicted of a felony.

As stated earlier, Petitioner was originally charged with health care claims fraud, in the second degree under the provisions of N.J.S.A. 2C:21-4.3(a), but through plea bargaining, the indictment was amended to health care claims fraud in the third degree, under N.J. S.A. 2C:21-4.3(c).[2]

Petitioner argues that under New Jersey law criminal offenses are classified as first, second, third, or fourth degree crimes, and that there is no classification of crimes as felonies. The only other distinction, adds Petitioner, is that first, second, and third

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[2] It is puzzling that Petitioner was allowed to enter a plea of guilty to section 2C:21-4.3(c), inasmuch as that section is reserved for non-practitioners, and in the complaint it was clearly stated that she was a practitioner. I.G. Ex. 2, at 1. I infer that under the New Jersey statute, practitioners are held to a higher standard than non-practitioners. However, for purposes of exclusion under section 1128(a)(3) of the Act it is of no consequence that Petitioner was convicted of a crime in the third degree as opposed to a crime in the second degree

degree crimes are considered high misdemeanors. Thus, Petitioner contends that although the offense for which she was convicted is classified as a third degree high misdemeanor, it cannot be concluded that she committed a felony under New Jersey law. P. Br. at 6-7.

Petitioner further reasons that crimes of the first and second degree under New Jersey law are treated more harshly than crimes of the third and fourth degree. Based on that logic, Petitioner argues that only the first and second degree offenses are considered felonies, and that third degree crimes, like the one involved in this case, should not be considered a felony. P. Br. at 11.

The I.G. relies on the decision issued in *Catherine Ann Fee*, DAB No. CR 1598 (2007) and *United States v. Brown*, 937 F.2d 68 (2d Cir. 1991). Petitioner, however, dismisses these cases as inapplicable and unpersuasive. As to the holding in *United States v. Brown*, Petitioner maintains that the New Jersey Supreme Court has settled the question that there is no equation between a high misdemeanor and the common-law felony, and has also rejected the purported federal standard that felonies are offenses that are considered punishable by a term of more than one year. Petitioner further argues that the ALJ decision in *Catherine Ann Fee* erred in concluding that New Jersey defines felony to include high misdemeanors. In this regard, Petitioner contends that the ALJ's reliance on the New Jersey Uniform Fresh Pursuit Law (N.J.S.A. 2A:155-2) is misplaced. Petitioner acknowledges that the statute states that the term fresh pursuit is to be defined by common law, and also that the pursuit of a person suspected of having committed a felony includes high misdemeanor. However, Petitioner theorizes that such application of the Fresh Pursuit Law is a very narrow one, having no other application in the entire New Jersey Criminal justice system. P. Br. at 7-8. And more importantly, it is inapplicable to the case at hand.

Petitioner places principal reliance in the New Jersey Supreme Court case of *State v. Smith*, 37 N.J. 481 (1962). In that case a defendant was convicted of possession of heroin in violation of R.S. 24:18-4, N.J.S.A. The issue before the New Jersey Supreme Court was whether the conviction could stand despite the State's use of evidence seized through an illegal search. During the pendency of the appeal, the U.S. Supreme Court handed down the landmark decision in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L. Ed. 2d 1081 (1961), establishing that admission of evidence obtained as a result of an unlawful search and seizure violates due process. Though not central to the issue of the retroactive application of *Mapp v. Ohio*, the *State v. Smith* court addressed the definition of felony in considering whether a state's view with respect to arrest may be more restricted than the maximum approach consistent with the Fourth Amendment, thus raising the question of whether under *Mapp* a state court may admit evidence seized in connection with an arrest which is unlawful under state law but which could have been

authorized by the state without impinging upon the Amendment. The court thus stated the following:

> The problem further revolves about the definition of a 'felony.' At common law a peace officer could arrest if he had a reasonable basis to believe a felony was committed by the person he apprehends, even though the felony was not committed in his 'presence.'... Our criminal code does not use the word 'felony.' Rather all crimes (other than 'murder,' N.J.S. 2A:113-1, N.J.S.A., and 'treason,' N.J.S. 2A:148-1, N.J.S.A.) are denominated as 'misdemeanors,' while a petty offense is called a 'disorderly person offense.' The maximum penalty upon conviction as a disorderly person is one year in jail and a fine of $1,000. N.J.S. 2A:169-4, N.J.S.A. Misdemeanors carry a maximum of three years plus a fine of $1,000. N.J.S. 2A:85-7, N.J.S.A. Some misdemeanors are characterized as 'high' misdemeanors, for which a larger sentence may be imposed. N.J.S. 2A:85-6, N.J.S.A. There is no equation between a 'high' misdemeanor and the common-law felony, *the characterization being wholly for the purpose of punishment* (emphasis added). *Brown v. State*, supra (62 N.J.L. at p. 695, 42 A. 811); *State v. Woodworth*, 121 N.J.L. 78, 82, 1 A.2d 254 (Sup.Ct.1938); cf. *State v. Smith*, supra (32 N.J., at p. 531, 161 A.2d 520). Hence the denomination of a crime as a misdemeanor or high misdemeanor is not the solvent of the question whether the offense is a felony within the common law of arrest. *Cf. State v. Genese*, 102 N.J.L. 134, 142-143, 130 A. 642 (E. & A. 1925).
>
> Elsewhere, for sundry purposes, a felony is deemed to be an offense for which a sentence to the state penitentiary could be imposed. *See* 22 C.J.S. Criminal Law § 6, p. 15; Annotation, 95 A.L.R. 1115 (1935); *Firestone v. Rice*, 71 Mich. 377, 38 N.W. 885 (1888). It is significant that the Congress has defined a 'felony' to be any offense 'punishable by imprisonment for a term exceeding one year,' 18 U.S.C. § 1,and has authorized federal officers to 'make arrests without warrant for any felony cognizable under the laws of the United States if they have reasonable grounds to believe

> that the person to be arrested has committed or is committing such felony,' 18 U.S.C. §§ 3052, 3053. If that criterion should be controlling, our misdemeanors, since they carry an authorized penalty of three years for which a sentence to state prison could be imposed, N.J.S. 2A:164-15, N.J.S.A. would be 'felonies' within the common law of arrest.

State v. Smith, 37 N.J. 481, 493-494.

The language in *State v. Smith* lends no support to Petitioner's theory. Furthermore, Petitioner ignores the clear language of other precedents that clearly equate her conviction with a felony, whether viewed from the stand point of local or federal law. It is unequivocal, though, that federal law is controlling.

In *State v. Doyle*, 42 N.J. 334, 200 A.2d 606 (1964) a case decided by the New Jersey Supreme court two years after *State v. Smith*, the New Jersey Supreme Court, in considering the legality of a warrantless arrest held as follows:

> The described classification and the absence of a specific 'felony' category in our crimes act create a necessity for decision with respect to the kind of offense which will justify a police officer in arresting without a warrant. As has been shown above, most jurisdictions, either by statute or judicial declaration, regard an offense which may be punished by confinement in a state prison as sufficient for such purpose. In New Jersey a disorderly person infraction is not a crime and does not carry the stigma or disqualification associated with conviction of crime. Although it may be punished by a maximum term of one year, the imprisonment must be in a county institution and not the state prison. It would seem, therefore, that in our State statutory authorization for a more severe penalty, i.e., for more than a year and in a state prison, ought to be regarded as necessary. Cf. N.J.S.A. 2A:164-15, 17, N.J.S.A.
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> Misdemeanors under the crimes act which are punishable by imprisonment for more than a year in state prison, in our judgment, *and we so hold* (emphasis added), are sufficiently equatable with common law felony to justify arrest by a peace officer without a warrant when he has reasonable ground to

> believe that an offense of that grade is being or has been committed by the person to be apprehended. *See State v. Smith*, supra (37 N.J., at p. 494, 181 A.2d 76). Such a rule conforms with the federal statute, the proposal of the Model Penal Code and, in the light of the development of the criminal law in our State, represents a proper association between the common law test and our crimes act.

State v. Doyle, 42 N.J. 334, 348-349.

The offense in *Doyle,* as in the case before me, was a high misdemeanor, punishable by imprisonment in excess of one year. The *Doyle* court concluded that inasmuch as abortion was a misdemeanor subject to more than 1-year prison term it should be treated as a felony.

The holding in *Doyle* was reiterated in *Kaplowitz v. State Farm Mutual Auto Insurance Co.*, 201 N.J. Super 593, 493 A. 2d 637 (1985):

> The remaining question is whether Kaplowitz was committing a "felony" or "high misdemeanor" at the time of the accident. The reference to "high misdemeanor" in the No Fault Act embraces any offense treated as a first, second or third degree crime under the Code of Criminal Justice. N.J.S.A. 2C:1-4(d).
>
> Although neither the No Fault Act nor the Code of Criminal Justice contains a definition of "felony," the Court concluded in *State v. Doyle*, 42 N.J. 334, 349, 200 A.2d 606 (1964), that only offenses that are punishable by more than one year in state prison should be treated as common law felonies. Hence, the term "felony" may embrace fourth degree crimes, which are punishable by imprisonment of as much as 18 months, N.J.S.A. 2C:43-6(a)(4), but it would not include disorderly persons offenses, for which the maximum term of imprisonment is 6 months. N.J.S.A. 2C:43-8; *State v. Doyle*, 42 N.J. 334.

Kaplowitz v. State Farm Mutual Auto Insurance Co., 201 N.J. Super 593, 598. In view of the above, it is beyond question that Petitioner was convicted of a felony under New Jersey law. As pointed out by the I.G., the federal courts have recognized this and have used the previously cited New Jersey case law as support. The matter was addressed in

United States v. Brown, 937 F.2d 68. In *Brown* the defendant was convicted in New York for possession of cocaine with intent to distribute. The government pressed for enhancement of the penalty due to a prior felony conviction in the State of New Jersey. Brown opposed the government's motion, arguing that his New Jersey high misdemeanor conviction did not constitute a felony conviction. The Second Circuit disagreed in the following terms:

> New Jersey does not classify its criminal offenses as misdemeanors or felonies. *See* N.J.S. Secs. 2C:1-4, 2C:43-1; *see also New Jersey v. Doyle*, 42 N.J. 334, 200 A.2d 606, 613 (1964). Under New Jersey's scheme of classifying criminal offenses in use at the time of Brown's 1985 conviction, all crimes except treason and murder were labeled either "misdemeanors" or "high misdemeanors." Doyle, 200 A.2d at 613-14. Nonetheless, New Jersey courts have had to confront the issue of how to apply the term "felony" to the state's criminal laws. *E.g., id.* (whether the high misdemeanor of abortion could be classified as a felony, thereby justifying a warrantless arrest based on probable cause). Such cases have clearly established that under New Jersey law, offenses punishable by more than one year in prison constitute common-law felonies. *See, e.g., id.*, 200 A.2d at 614; *Kaplowitz v. State Farm Mutual Automobile Insurance Co.*, 201 N.J.Super. 593, 493 A.2d 637, 639-40 (Law Div. 1985).
>
> *Brown* does not dispute that his 1985 New Jersey conviction was punishable by up to five years imprisonment, even though he only received a sentence of three years probation. Thus, the conviction was a "felony" under New Jersey law, and so the district court properly enhanced Brown's sentence under section 841(b)(1)(B).

United States v. Brown, 937 F.2d 68, 70.

In view of the foregoing, I find that Petitioner was convicted of a felony under New Jersey law. She received a five year prison sentence due to her conviction of health care claims fraud, even though the effects of the sentence were suspended. The pertinent case law does not lend itself to any other interpretation. Petitioner's attempt to limit the scope of case law to the Fresh Pursuit Law is misplaced. Moreover, I agree with the ALJ in *Catherine Ann Fee* that a third degree high misdemeanor constitutes a felony for purposes of an exclusion under section 1128(a)(3) of the Act, regardless of whether we apply a federal standard or New Jersey law.

3. Petitioner's exclusion for a period of five years is not unreasonable.

An exclusion under section 1128(a)(3) of the Act must be for a minimum mandatory period of five years, as set forth in section 1128(c)(3)(B) of the Act:

> Subject to subparagraph (G), in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . . .

When the I.G. imposes an exclusion for the mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2). Aggravating factors that justify lengthening the exclusion period may be taken into account, but the five-year term will not be shortened. Petitioner was convicted of a felony 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. As a result of Petitioner's conviction, the I.G. was required to exclude her pursuant to section 1128(a)(3) of the Act, for at least five years.

V. Conclusion

Petitioner's conviction pursuant to sections 1128(a)(3) and 1128(c)(3)(B) of the Act mandate that she be excluded from Medicare, Medicaid, and all other federal health care programs, for a period of at least five years.

/s/ José A. Anglada
Administrative Law Judge