**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Dawn Coffee,

Petitioner,

v.

The Inspector General.

Docket No. C-13-246

Decision No. CR2804

Date: May 30, 2013

# DECISION

This matter is before me on review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Dawn Coffee 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* Dawn Coffee is a licensed practical nurse licensed to practice in the State of Missouri. In 2010 she was employed in a physician's office. While so employed, but without the physician's knowledge or authorization, she called a local pharmacy and placed a prescription for hydrocodone for a person named Shane Umfleet, who later obtained the drugs prescribed on January 5, 2010 by paying for them with a check on a closed bank account.

Local law enforcement authorities became aware of the transaction and on January 22, 2010 filed a criminal complaint against Petitioner in the Circuit Court of Stoddard

County, Missouri. I.G. Ex. 4. The complaint was followed on March 1, 2010 by the filing of an Information charging Petitioner with the Class D felony of Fraudulently Obtaining a Controlled Substance, in violation of MO. REV. STAT. § 195.204. I.G. Ex. 5. On April 21, 2010, Petitioner appeared with counsel in the Circuit Court and pleaded guilty to the charge of Fraudulently Attempting to Obtain a Controlled Substance, in violation of MO. REV. STAT. § 195.204. This final charge, specifically the one on which Petitioner was ultimately convicted, is classified as a Class D felony by Missouri statutes, MO. REV. STAT. §§ 558.011.1(4) and 195.204.2. I.G. Ex. 2

Petitioner returned to the Circuit Court with counsel on June 2, 2010. Imposition of sentence on her plea was suspended, and she was placed on four years of supervised probation. She was required to pay $46.00 to a victim compensation fund. She was discharged early from her term of probation by the Missouri Board of Probation and Parole on October 26, 2012. I.G. Ex. 6.

On November 30, 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. The I.G.'s action was required by the terms of section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a).

Acting *pro se*, Petitioner timely sought review of the I.G.'s action by letter dated December 10, 2012. I convened a telephonic prehearing conference on January 22, 2013, 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, as amended by my Order of March 25, 2013, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case closed on May 13, 2013.

There are seven exhibits in this case. The I.G. proffered six exhibits marked I.G. Exhibits 1 through 6 (I.G. Exs. 1-6), and they are admitted without objection. Petitioner filed an undated letter from her employer's administrative assistant, K. Nenninger, but that document was not marked as an exhibit in compliance with CRDP § 9 and paragraphs 5(e) and 10 of my Orders of January 22, 2013 and March 25, 2013. 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. 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 April 21, 2010, in the Circuit Court of Stoddard County, Missouri, Petitioner Dawn Coffee pleaded guilty to one Class D felony count of Fraudulently Attempting to Obtain a Controlled Substance, in violation of MO. REV. STAT. § 195.204. The conduct to which Petitioner pleaded guilty occurred on or about January 5, 2010. I.G. Exs. 2, 5.

2. On June 2, 2010, the Circuit Court suspended imposition of sentence on Petitioner's guilty plea, and she was placed on four years of supervised probation. I.G. Exs. 2, 6. She was discharged from her term of probation by the Missouri Board of Probation and Parole on October 26, 2012. I.G. Ex. 6.

3. The accepted plea of guilty and the suspension of the imposition of sentence described above in Findings 1 and 2 constitute a "conviction" within the meaning of sections 1128(a)(3) and 1128(i)(3) and (4) of the Act, and 42 C.F.R. § 1001.2.

4. There is a nexus and a common-sense relationship between the felony offense of which Petitioner was convicted, as noted above in Findings 1, 2, and 3 above, 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).

Petitioner does not contest the existence of the second, third, and fourth essential elements, and their presence is plain on this record. The fourth element is proven by the date of the misconduct charged. The second and third elements are shown by the events set out in the charging documents, by the substance of the charge as defined by Missouri statute, and by Petitioner's stipulation before the Missouri State Board of Nursing that her crime was "an offense an essential element of which is fraud and/or dishonesty." I.G. Ex. 3, at 2. The nexus of this misconduct with the delivery of a health care item, based as it is on the unauthorized generation of the hydrocodone prescription, is obvious. Thus, the evidence shows that Petitioner acted fraudulently, and in connection with the delivery of a health care item, well after August 21, 1996.

Petitioner's defense rests on her assertion that the proceedings against her did not result in a conviction. She does not deny the procedural history of those proceedings as set out above in Findings 1 and 2 above, but she argues that under Missouri law, her successful — and early — completion of her term of probation leaves her without a felony conviction. Neither Petitioner nor the I.G. have proffered documents with any specific reference to the Missouri statute applicable to this situation, but I believe that the statutes involved are most likely MO. REV. STAT. §§ 557.011.2(3), 557.011.2(4), and 610.105.

Petitioner is correct in arguing that under Missouri law a criminal case concluded by the suspended imposition of sentence does not result in a "conviction." *M.A.B. v. Nicely*, 909 S.W.2d 669 (Mo. 1995) (en banc); *Yale v. City of Independence*, 846 S.W.2d 193 (Mo. 1993) (en banc); *Missouri ex rel. Light v. Sheffield*, 768 S.W.2d 590 (Mo. Ct. App. 1989). The terms of MO. REV. STAT. § 610.105 allow deserving defendants to avoid the civil, criminal, and social consequences of a record as a convicted felon. Without lengthy citation here, I note that Missouri courts have, when asked to do so, steadfastly applied their "no-conviction" interpretation to criminal dispositions under MO. REV. STAT. § 610.105. The State of Missouri's policy that permits such a result may be entirely reasonable, and nothing in this decision should be understood to trivialize or discount Petitioner's success in complying with the requirements of that policy. The established law of this forum, however, requires that the Act's definitions of "conviction" be applied in these circumstances. Those specific definitions noted in sections 1128(i)(3) and 1128(i)(4) of the Act encompass the proceedings against Petitioner. By the federal definitions applicable in this federal litigation aimed at protecting the integrity of federal health care programs, the criminal proceedings against Petitioner ended in her "conviction."

This issue has been debated in this forum and before the Departmental Appeals Board (Board) for two decades, and its resolution has never varied. The Administrative Law Judges (ALJs) of this forum and appellate panels of the Board have frequently addressed petitioners' arguments that they should not be regarded here as "convicted" because they are not considered "convicted" under state law. The Board panels and ALJs of this forum have consistently rejected those arguments for the reason that federal law — specifically

section 1128(i) of the Act — and not state laws, governs the meaning of "convicted" in applying the terms of the Social Security Act. *Ellen L. Morand*, DAB No. 2436 (2012); *Henry L. Gupton*, DAB No. 2058 (2007), *aff'd sub nom. Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008); *Marc Schneider, D.M.D.*, DAB No. 2007 (2005); *Carolyn Westin*, DAB No. 1381 (1993), *aff'd sub nom. Westin v. Shalala*, 845 F.Supp. 1446 (D. Kan. 1994); *see Bethany Anne Winther-Galimore*, DAB CR2501 (2012); *Myrna Baptista*, DAB CR2410 (2011); *Theresa A. Bass*, DAB CR1397.

The five-year period of exclusion proposed in this case is the minimum required by section 1128(c)(3)(B) of the Act. As a matter of law it is not unreasonable, and neither the Board nor I can reduce it. 42 C.F.R. § 1001.2007(a)(2); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

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, unambiguous, and support summary disposition as a matter of settled law. 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 Dawn Coffee 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