Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Lisa Marie Sanders, D.O.,	)	Date: August 10, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-217
	)	Decision No. CR1988
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Lisa Marie Sanders, from participating in Medicare, Medicaid, and all federal health care programs for a period of five years[1]. I find the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(4) of the Social Security Act (Act) and that the five-year exclusion imposed by the I.G. is the minimum mandatory period of exclusion under the Act. Act, section 1128(c)(3)(B).

I. Background

By letter dated April 30, 2008, the I.G. notified Petitioner that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, the minimum statutory period. The I.G. notified Petitioner that she was being excluded under section 1128(a)(4) of the Act because she had been convicted in the United States District Court, Southern District of Georgia, Augusta Division, of a criminal felony offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

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1 This case was docketed under the name of Lisa Marie Sanders. Petitioner maintains, however, that her name is Lisa Daylida Sanders, which is the name on the I.G.'s notice letter. I note that the names "Lisa Daylida Sanders aka Lisa Marie Sanders aka Lisa Marie Daylida" appear on the Grand Jury indictment.

By letter dated January 14, 2009, Petitioner contested the exclusion. I convened a prehearing conference on April 13, 2009. During the conference, I informed Petitioner that she had a right to be represented by counsel and I explained the limits of my authority to Petitioner. Petitioner stated that she would represent herself. Petitioner stated further that she was not appealing the exclusion itself but only the effective date of the exclusion. I informed Petitioner that there were only two issues I had authority to address in this case. The issues are whether the I.G. had the authority to exclude Petitioner and, if so, whether the period of exclusion was reasonable. I informed Petitioner that since she had been excluded for a statutory mandatory period of five years I could not reduce the period of exclusion. I further informed Petitioner that I did not have the authority to change or alter in any way the effective date of the exclusion. I asked Petitioner if she wished to contest the issue as to whether the I.G. had the authority to exclude her and she answered affirmatively. Counsel for the I.G. stated that Petitioner's request for hearing was untimely filed and that there exists a basis for the exclusion. The parties agreed that this case could be decided on written submissions. With the assistance of the parties I set a briefing schedule.

The I.G. timely submitted a motion for summary affirmance and supporting brief (I.G. Br.), accompanied by I.G. Exhibits (I.G. Exs.) 1-7. Petitioner timely submitted her brief (P. Br.) accompanied by Petitioner's Exhibits (P. Exs.) 1-3. The I.G. timely submitted a reply brief (I.G. Reply Br.). In the absence of objection, I am accepting I.G. Exs. 1-7 and P. Exs. 1-3 into evidence.

II. Applicable Law

Section 1128(a)(4) of the Act mandates exclusion of an individual convicted, under federal or state law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance (which offense occurred after the date of the enactment of the Health Insurance Portability and Accountability Act (HIPAA)). A "conviction" is defined under section 1128(i) of the Act to include: (1) when a judgment of conviction has been entered against an individual by a federal, state, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged; (2) when there has been a finding of guilt against the individual by a federal, state or local court; (3) when a plea of guilty or nolo contendere by the individual has been accepted by a federal, state, or local court; or (4) when the individual has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been with-held. The Act mandates that an exclusion imposed under section 1128(a)(4) be for a minimum period of five years. Act, section 1128(c)(3)(B).

An individual who is the subject of an adverse determination by the I.G. is entitled to a hearing before an administrative law judge (ALJ), but only if he or she files a hearing request within 60 days after receiving notice of the I.G.'s determination. 42 C.F.R. § 1005.2(c). The date of receipt of the notice is presumed to be five days after the date of the notice absent some showing to the contrary by the individual who is the addressee. *Id.*

III. Issue

The hearing request is on its face untimely. The facts in this case are that the I.G.'s notice letter is dated April 30, 2008. The notice letter was subsequently returned as undeliverable. I.G. Br. at 2. By letter dated December 15, 2008, Petitioner inquired about her exclusion. I.G. Ex. 2. By letter dated January 6, 2009, the Reviewing Official for Health Care Program Exclusion forwarded a copy of the April 30, 2008 exclusion notice to Petitioner. I.G. Ex. 3. Petitioner subsequently requested a hearing concerning her exclusion by letter dated January 14, 2009. The I.G., in its reply brief, expressly states that it does not object to Petitioner's request for hearing based on timeliness because the I.G. recognizes that the initial notice did not reach Petitioner. I.G. Reply Br. at 3. Petitioner was ultimately provided with reasonable notice of her exclusion and is being provided with an opportunity for hearing. Therefore, the only remaining issue in this case is whether the I.G. had a basis upon which to exclude Petitioner. As the I.G. imposed the minimum mandatory period of exclusion, five years, there is no issue as to whether the exclusion is unreasonable. Act, section 1128(c)(3)(B).

IV. Findings and Discussion

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

> ***1. The I.G. had a basis upon which to exclude Petitioner because she was convicted of a criminal offense consisting of felony relating to the unlawful dispensing of a controlled substance which occurred after the date of the enactment of HIPAA.***

During the relevant period, Petitioner was a physician practicing medicine in the State of Georgia. On January 19, 2005, a one count criminal information (Information) was filed against Petitioner in the United States District Court for the Southern District of Georgia, charging Petitioner with one felony count of "Acquiring a Controlled Substance by Deception or Subterfuge" in violation of 21 U.S.C. § 843(a)(3). I.G. Exs. 5, 6. The Information charges Petitioner with "knowingly, intentionally, and unlawfully obtain[ing] and acquir[ing] Percocet, with contains oxycodone, a Schedule II controlled substance, by deception and

subterfuge." I.G. Ex. 5, at 1. Petitioner had prescribed 40 tablets of Percocet for a patient, obtained the prescription bottle containing the Percocet, emptied the Percocet tablets, replaced the Percocet tablets with acetaminophen tablets, and returned the prescription bottle with the acetaminophen tablets to the patient. Petitioner kept the Percocet tablets for her own use. *Id*.

On January 12, 2005, Petitioner entered into a plea agreement. Under the terms of the plea agreement, Petitioner affirmed that the facts stated in the Information were true. I.G. Ex. 5, at 9. Petitioner pled guilty to Count I of the Information, acquiring a controlled substance by deception or subterfuge, and the plea was accepted by the United States District Court, Southern District of Georgia, Augusta Division, on May 26, 2005. I.G. Ex. 7. Petitioner was sentenced to imprisonment for six months, one year of supervised release, and payment of assessments and fines. *Id*.

The elements necessary to support an individual's exclusion under section 1128(a)(4) are that: 1) the individual must have been convicted of a criminal offense; 2) the criminal offense must have been a felony; 3) the offense must have occurred after the enactment of HIPAA; and 4) the felony conviction must have been for conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I find all four elements to have been met in this case.

First, Petitioner was convicted of a criminal offense under the Act. The I.G.'s authority to exclude individuals from participation in federal health care programs is based on federal, not state law, and the issue of whether an individual has been convicted of an offense within the meaning of section 1128(i) is governed by federal law. *Roger L. Wadley,* DAB CR1074 (2003), *citing Travers v. Shalala*, 20 F.3d 993, 996-97 (9th Cir. 1994). As an appellate panel of the Departmental Appeals Board (Board) stated in the case of *Carolyn Westin,* DAB No. 1381, at 6 (1993), Congress broadly defined the term "conviction" in order "to ensure that exclusions from federally funded health programs would not hinge on state criminal justice policies."

Here, Petitioner's guilty plea to Count I of the Information, and the Court's acceptance of that plea, demonstrate that she was, in fact, "convicted" within the meaning of section 1128(i)(3) of the Act.

Second, the criminal offense for which Petitioner was convicted, Count I of the Information, is a felony. I.G. Ex. 7.

Third, Petitioner's criminal offense took place after the effective date of HIPAA (which was August 21, 1996), as the criminal offense underlying Count I of the Information to which Petitioner pled guilty took place on or about January 12, 2003. I.G. Ex. 5, at 1.

Finally, fourth, Petitioner's felony conviction relates to the unlawful dispensing of a controlled substance. Petitioner's felony conviction under 21 U.S.C. § 843(a)(3) was for acquiring a controlled substance by deception or subterfuge. Petitioner, a physician working at the Fort Gordon Military Reservation, prescribed 40 Percocet tablets for a patient. After the prescription was filled for the patient, Petitioner got possession of the prescription bottle and replaced the Percocet tablets with acetaminophen tablets. Petitioner retained possession of the Percocet tablets and returned the prescription bottle with the acetaminophen tablets to the patient. Petitioner admitted to these facts when she signed the plea agreement. In Petitioner's brief she again admits to these facts but adds that the patient's husband had returned with the filled prescriptions and gave the prescriptions to the patient. Petitioner claims as a defense that she was not convicted of an offense related to prescribing or distributing a controlled substance. P. Br. at 2. Specifically, in her response, Petitioner asserts:

> The patient looked through the several medications I had appropriately prescribed and she then told me that Percocet would make her itchy and I should take them back. The crime started there. I took the bottle as if to dispose of pills but stole them for my own use. I refilled the bottle with generic Tylenol and told her to take them and throw them in the toilet at home.

P. Br. at 2.

Petitioner misapprehends the nature of section 1128(a)(4) of the Act. The section does not require that an individual be convicted of manufacturing, distributing, dispensing or prescribing and does not refer to the level or seriousness of the criminal activity.

Instead, all the statute requires is that a petitioner's criminal offense be "related" to those actions in a "useful and common-sense fashion to serve the remedial purposes of the exclusion remedy." *Deborah Joe Oltman, R.N.,* DAB No. CR1254, at 10 (2004). I find convincing the I.G.'s argument that the conduct upon which Petitioner was convicted relates to the unlawful "dispensing" of controlled substances within the meaning of section 1128(a)(4) of the Act. Petitioner's conviction on its face relates to the dispensing of a controlled substance. By stealing the pain medication intended for another person for her own use, Petitioner essentially engaged in the act of dispensing a controlled substance to

herself. *See Michael J. O'Brien, D.O.,* DAB CR1150 (2004) (criminal offense for self-dispensing of pharmaceuticals is related to the unlawful dispensing of controlled substances within the meaning of section 1128(a)(4) of the Act); *Sean M. Maguire, M.D.,* DAB CR837 (2001) (exclusion upheld as an unlawful "dispensing" under section 1128(a)(4) of the Act based on Petitioner's conviction of three felony counts of obtaining a controlled substance by fraud where petitioner diverted the controlled substance for his personal use). Based on the evidence before me, I find that the I.G. has established that Petitioner's felony conviction was "related to" the unlawful dispensing of a controlled substance within the meaning of section 1128(a)(4) of the Act.

2. I do not have authority to alter the effective date of an exclusion.

In Petitioner's January 14, 2009 hearing request she argues that, because of the interval between her conviction in May 2005 and the I.G.'s April 30, 2008 exclusion notice, the exclusion should be imposed retroactively. She contends that the exclusion should have started in May 2005, when she pled guilty to the offense she committed.

I do not have the authority to alter the effective date of the exclusion. The Board has repeatedly held that the applicable statute and regulations give an ALJ no authority to adjust the beginning date of an exclusion by applying it retroactively. *Lisa Alice Gantt*, DAB No. 2065 (2007); *Thomas Edward Musial*, DAB No. 1991, at 4-5 (2005), citing *Douglas Schram, R.Ph.*, DAB No. 1372, at 11 (1992) ("Neither the ALJ nor this Board may change the beginning date of Petitioner's exclusion."); *David D. DeFries*, DAB No.1317, at 6 (1992) ("The ALJ cannot . . . decide when [the exclusion] is to begin."); *Richard D. Phillips*, DAB No. 1279(1991) (An ALJ does not have "discretion . . . to adjust the effective date of an exclusion, which is set by regulation."); *Samuel W. Chang*, M.D., DAB No. 1198, at 10 (1990) ("The ALJ has no power to change . . . [an exclusion's] beginning date.").

3. I cannot consider Petitioner's other arguments in mitigation of the length of her exclusion, as Petitioner has been excluded for the minimum mandatory period.

Petitioner asserts in her response that she had not planned her offense, that it was an instantaneous poor decision. She asserts that she did not hurt anyone but herself and that her treatment of her patient was above the standard of care. Further, she asserts that she has experienced the loss of her children while in prison, bankruptcy, loss of career and license, poverty, drug addiction, domestic violence, divorce, and multiple surgeries. I cannot consider these assertions, however, and change the length of Petitioner's period of exclusion. Once an

individual has been convicted of a criminal offense within the meaning of section 1128(a)(4), exclusion from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years is mandatory and cannot be shortened. Act, section 1128(c)(3)(B).

V. Conclusion

For the foregoing reasons, I sustain Petitioner's exclusion from participation in Medicare, Medicaid, and all federal health care programs for a period of five years.

/s/
Alfonso J. Montano
Administrative Law Judge