

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Michelle Slone,  
(O.I. File Number H-11-41570-9)

Petitioner

v.

The Inspector General,  
U.S. Department of Health and Human Services.

Docket No. C-12-366

Decision No. CR2568

Date: July 17, 2012

**DECISION**

Petitioner, Michelle Slone, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) effective January 19, 2012, based upon her conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period<sup>1</sup> of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

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<sup>1</sup> Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

## I. Background

The Inspector General (I.G.) for the Department of Health and Human Services (HHS) notified Petitioner by letter dated December 30, 2011, 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. advised Petitioner that she was being excluded pursuant to section 1128(a)(1) of the Act based on her conviction in the Common Pleas Court, Franklin County, Ohio, Criminal Division, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing by letter dated February 1, 2012 (Hearing Request). The case was assigned to me for hearing and decision. A prehearing telephone conference was convened on March 6, 2012, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated March 8, 2012. During the prehearing conference, Petitioner waived an oral hearing, and the parties agreed that the matter could be resolved based on the briefs and documentary evidence. Accordingly, I set a briefing schedule for the parties.

Petitioner filed a number of unmarked documents on March 22, 2012, consisting of an Ohio Board of Nursing Consent Agreement and various other documents regarding her competence as a nurse, her character, and her criminal offense.<sup>2</sup> The I.G. filed a brief (I.G. Br.) on April 5, 2012, with I.G. exhibits (I.G. Exs.) 1 through 5.<sup>3</sup> On May 21, 2012,

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<sup>2</sup> I refer to the individuals who executed the documents filed by Petitioner by initials only. The documents filed by Petitioner include: a consent agreement between Petitioner and the Ohio Board of Nursing signed by Petitioner on December 20, 2011, and by a representative of the Ohio Board of Nursing on January 20, 2012; a July 5, 2011 letter from HM regarding Petitioner's care of HM's son; a July 3, 2011 letter from Petitioner to the Ohio Board of Nursing; a July 7, 2011 letter from Petitioner's probation officer with the Franklin County Adult Probation office to the Ohio Board of Nursing; two copies of an undated letter signed by Petitioner's father, mother, and sister to the Ohio Board of Nursing; a December 23, 2010 review of Petitioner's performance by her former employer; a June 26, 2011 letter from SM, Petitioner's co-worker; a July 6, 2011 letter from VC, the Director of Nursing of Marion Manor, where Petitioner was then employed; a June 29, 2011 letter from CW, the daughter of two individuals for whom Petitioner worked as a personal caregiver; and a July 1, 2011 letter from SB, Petitioner's co-worker.

<sup>3</sup> The I.G. amended his initial filings on April 10, 2012. The DAB file contains both the I.G.'s initial and amended filings. In this decision I refer to the I.G.'s amended exhibits and brief.

I issued an Order to Show Cause, because Petitioner had not timely filed her brief and exhibits. I ordered that on or before June 1, 2012, Petitioner show cause why I should not dismiss the case for abandonment. On May 30, 2012, Petitioner responded (P. Response) stating that she had filed everything she wished for me to consider on March 22, 2012. The I.G. filed a written waiver of reply on June 6, 2012. No objections have been made to my consideration of the I.G.'s offered exhibits, or to any of Petitioner's unmarked submissions of March 22, 2012. All the documents are admitted as evidence.

## **II. Discussion**

### **A. Applicable Law**

Petitioner's rights to an administrative law judge (ALJ) hearing and judicial review of the final action of the HHS Secretary (Secretary) are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

### **B. Issue**

The Secretary has by regulation limited my scope of review to two issues:

Whether there is a basis for the imposition of the exclusion; and

Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

### **C. Findings of Fact, Conclusions of Law, and Analysis**

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

#### **1. Petitioner's request for hearing was timely, and I have jurisdiction.**

There is no dispute that Petitioner timely requested a hearing and I have jurisdiction to hear the case. Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to a hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. §§ 1001.2007(a) and 1005.2, and

the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 42 C.F.R. § 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An oral hearing was waived in this case.

**2. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.**

Petitioner admits that she was convicted of a misdemeanor criminal offense. Hearing Request. Petitioner does not dispute the evidence presented by the I.G. On October 19, 2010, a special grand jury in the Common Pleas Court, Franklin County, Ohio, Criminal Division, returned a one-count indictment against Petitioner. The indictment charged Petitioner with the crime of Theft by Deception, a fifth degree felony, in violation of section 2913.02(A)(3) of the Ohio Revised Code. I.G. Exs. 2, 3. The charge was based upon Petitioner having billed and received payment from the Ohio Medicaid program for home health aide services that were not delivered by her but by her sister, who was not authorized to participate in the Medicaid program. I.G. Exs. 2, 3. On February 9, 2011, Petitioner pled guilty to the lesser included offense of Theft by Deception, a first degree misdemeanor, and she was found guilty pursuant to her plea. I.G. Exs. 2, 4, 5. The court placed Petitioner on probation for five years and ordered her to pay restitution of \$3,000 to the Ohio Medicaid program. I.G. Ex. 4.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

(a) MANDATORY EXCLUSION. The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

(1) Conviction of program-related crimes. Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

The statute requires that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a criminal offense, whether a felony or a misdemeanor; (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program.

Pursuant to section 1128(i) of the Act, an individual is “convicted” of a criminal offense when: (1) a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; (2) there has been a finding of guilt in a federal, state, or local court; (3) a plea of guilty or no contest has been accepted in a federal, state, or local court; or (4) an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. In this case, the evidence shows that Petitioner pled guilty and a judgment of conviction was entered pursuant to her guilty plea.

Accordingly, I conclude that Petitioner was “convicted” as that term is defined by section 1128(i) of the Act for purposes of exclusion pursuant to section 1128(a)(1) of the Act, based on the court’s acceptance of her guilty plea.

I also conclude that Petitioner’s conviction is program-related within the meaning of section 1128(a)(1) of the Act. The indictment states that Petitioner deprived the Ohio Medicaid program of its property and obtained money from it through deception. I.G. Ex. 3, at 1. The affidavit of the Assistant Attorney General, who presented the case to the special grand jury, shows that Petitioner deprived the Ohio Medicaid program of its property and obtained money from the program by deception when Petitioner billed the Ohio Medicaid program using her provider number for home health services actually delivered by her sister. I.G. Exs. 2, 3; undated letter signed by Petitioner’s father, mother, and sister. Petitioner was ordered to pay restitution of \$3,000 to the Ohio Medicaid program, which is consistent with that amount being the approximate loss to Ohio Medicaid. I.G. Exs. 2, 4. I conclude based on the undisputed facts that there is a clear “nexus or common-sense connection” here between Petitioner’s criminal conduct and the delivery of an item or service under Medicaid. *Timothy Wayne Hensley*, DAB No. 2044 (2006); *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Tanya Chuoke, R.N.*, DAB No. 1721 (2000); *Berton Siegel, D.O.*, DAB No. 1467 (1994); *Thelma Walley*, DAB No. 1367 (1992).

Accordingly, I conclude that the elements of section 1128(a)(1) of the Act are satisfied, there is a basis for Petitioner’s exclusion, and exclusion is required.

Petitioner does not dispute the evidence presented by the I.G. or the basis for her conviction. Petitioner admits what she did was wrong and states she has learned a lesson. Petitioner asserts that she is not a danger to the Medicare and Medicaid programs because the Ohio Board of Nursing is supervising her activities. Petitioner states that since her offense she has become a licensed practical nurse, but as a consequence of her exclusion

she cannot take a job in that capacity. Petitioner requests that her exclusion be removed so that she can support her large family.<sup>4</sup> Hearing Request; P. Response.

Petitioner's arguments are unavailing. Congress requires exclusion in this case under section 1128(a)(1) of the Act. The I.G. and I have no discretion not to exclude Petitioner.

**3. Pursuant to section 1128(c)(3)(B) of the Act, five years is the minimum period of exclusion pursuant to section 1128(a) of the Act.**

**4. Petitioner's exclusion for five years is not unreasonable as a matter of law.**

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). The I.G. does not cite any aggravating factors in this case and does not propose to exclude Petitioner for more than the minimum period of five years.

I have concluded that Petitioner's exclusion is required by section 1128(a)(1) of the Act. Accordingly, the minimum period of exclusion is five years, and that period is not unreasonable as a matter of law.

### **III. Conclusion**

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years effective January 19, 2012.

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/s/  
Keith W. Sickendick  
Administrative Law Judge

<sup>4</sup> Petitioner stated in her request for hearing that her conviction was to be expunged in March. Petitioner offered no evidence to show that her conviction has been expunged. However, even if her conviction was expunged, that fact would not impact her exclusion as it is the fact that she was convicted that controls. Act § 1128(i).