Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Erin Dalton,
(OI File No. H-12-4-40482-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-543

Decision No. CR2922

Date: September 11, 2013

DECISION

This matter is before me in review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Erin Dalton 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)(4) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(4). As I explain below, the facts of this case require the imposition of a mandatory five-year exclusion. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. PROCEDURAL BACKGROUND

Erin Dalton, Petitioner *pro se*, was licensed by the Commonwealth of Pennsylvania as a registered nurse in 2004. She was employed in that capacity during 2010 at the Crozer-Chester Medical Center in Upland, Pennsylvania.

In April 2010, Petitioner attempted to use a forged prescription, naming herself as the patient and purportedly signed by a physician at that facility, to obtain a supply of schedule II controlled substance painkillers. Her effort was unsuccessful: the pharmacy

where she attempted to fill the prescription recognized it as fraudulent, and multiple criminal charges were soon filed against her. I.G. Exs. 3, 4. Those charges were resolved in a plea agreement Petitioner and her counsel reached with prosecutors, and on March 29, 2011, in the Court of Common Pleas of Delaware County, Pennsylvania, Petitioner pleaded *nolo contendere* to the felony offense of attempting to obtain a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge, in violation of 18 PA. CONS. STAT. § 901(a). I.G. Exs. 2, 5. When she returned to the Court of Common Pleas on June 14, 2011, she was sentenced to a three-year term of probation and was required to pay certain fees, costs, and assessments.

As required by the terms of section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. On January 31, 2013, the I.G. notified Petitioner that she was to be excluded for a period of five years pursuant to section 1128(a)(4). I.G. Ex. 1.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action on March 16, 2013. I convened a telephonic prehearing conference on April 15, 2013, pursuant to 42 C.F.R. § 1005.6. Its results and the actions taken during the conference are set out in my Order of that date, by which a schedule for the filing of the I.G.'s Motion and the parties' briefs on the merits of that Motion was established. That schedule was amended by my Order of June 20, 2013. The cycle of briefing closed for purposes of 42 C.F.R. § 1005.20(c) on August 29, 2013.

The evidentiary record on which I decide the issues before me contains 12 exhibits. The I.G. proffered seven exhibits marked I.G. Exhibits 1-7 (I.G. Exs. 1-7). Petitioner has proffered four exhibits marked Petitioner's Exhibits 1-4 (P. Exs. 1-4). I have admitted all proffered exhibits as marked, and I have *sua sponte* admitted a copy of the criminal docket sheet reflecting the complete course of the proceedings against Petitioner as ALJ Exhibit 1 (ALJ Ex. 1). This docket sheet was attached to Petitioner's request for hearing, but not proffered by her as an exhibit; I have admitted it because it is particularly helpful in understanding the course of the proceedings in the Court of Common Pleas.

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)(4) of the Act; and

2. Whether the five-year term of the exclusion is unreasonable.

The applicable authorities require that both issues be resolved in favor of the I.G.'s position. Section 1128(a)(4) of the Act mandates Petitioner's exclusion since her predicate conviction has been established. A five-year term of exclusion is the minimum period of exclusion established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), and is therefore reasonable as a matter of law.

III. CONTROLLING STATUTES AND REGULATIONS

Section 1128(a)(4) of the Act, 42 U.S.C. § 1320a-7(a)(4), 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 . . . 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." The terms of section 1128(a)(4) are restated somewhat more broadly in regulatory language at 42 C.F.R. § 1001.101(d).

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 or nolo contendere 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 in slightly different language at 42 C.F.R. § 1001.2.

An exclusion based in section 1128(a)(4) is mandatory and the I.G. must impose it for a minimum term of five years. Act § 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B).

IV. FINDINGS AND CONCLUSIONS

I find and conclude as follows:

1. On March 29, 2011, in the Court of Common Pleas of Delaware County, Pennsylvania, Petitioner Erin Dalton pleaded *nolo contendere* to the felony offense of attempting to obtain a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge, in violation of 18 PA. CONS. STAT. § 901(a). I.G. Exs. 2, 5.

2. Petitioner was sentenced in the Court of Common Pleas on June 14, 2011, and was placed on a three-year term of probation. She was also required to pay certain fees, costs, and assessments. I.G. Ex. 2, at 1.

3. The Court of Common Pleas' acceptance of Petitioner's *nolo contendere* plea constitutes a "conviction" within the meaning of section 1128(a)(4) and 1128(i)(3) of the Act, and 42 C.F.R. § 1001.2.

4. Petitioner was "convicted" within the meaning of section 1128(a)(4) and 1128(i)(4) of the Act, and 42 C.F.R. § 1001.2.

5. A nexus and a common-sense connection exist between the felony offense of which Petitioner was convicted, as noted above in Findings 1, 2, 3, and 4 and the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Exs. 3, 4; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

6. Petitioner's conviction 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)(4), 42 U.S.C. § 1320a-7(a)(4).

7. 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).

8. There are no disputed issues of material fact and summary disposition is 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)(4) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the criminal offense must have been a felony; (3) the felony conviction must have been for conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; and (4) the felonious conduct must have occurred after August 21, 1996. *Thomas Edward Musial*, DAB No. 1991 (2005); *Russell A. Johnson*, DAB CR1378 (2005); *Gerald A. Levitt, D.D.S.*, DAB CR1272 (2005); *Robert C. Richards*, DAB CR1235 (2004).

Petitioner denied the first element at the outset of this appeal: in her *pro se* hearing request of March 16, 2013, she asserted that the criminal proceedings did not result in her "conviction." She claimed then that upon the offer and acceptance of her *nolo contendere* plea, the trial judge placed her on supervised probation and withheld final adjudication of guilt and imposition of sentence. Petitioner claims that her "conviction" will be expunged at the end of the period of probation. Although she has not renewed that argument in her briefing, her *pro se* status requires that I address it here.

I have been unable to find any reference to such a resolution of Petitioner's case in the Court of Common Pleas' records before me. I.G. Exs. 2-5; ALJ Ex. 1. But the important point for this discussion is that even if Petitioner's description of the resolution of the proceedings against her is perfectly accurate, and even if the charges to which she pleaded *nolo contendere* have been or will eventually be dismissed, those proceedings would still constitute a "conviction" within the precise terms of section 1128(i)(4) of the Act, which declares that a conviction has occurred "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." Similar regulatory language appears at 42 C.F.R. § 1001.2, and both statute and regulation have been applied by the Departmental Appeals Board (Board) in rejecting arguments similar to Petitioner's. *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); *Carolyn Westin*, DAB No. 1381 (1993), *aff'd sub nom Westin* v. *Shalala*, 845 F. Supp. 1446 (D. Kan. 1994).

Moreover, the I.G. correctly points out that the trial court's acceptance of Petitioner's *nolo contendere* plea represents a second, independent, and entirely sufficient basis for regarding the proceedings in the Court of Common Pleas as culminating in Petitioner's "conviction." That is, the I.G. points out that whatever the effect of a deferred or withheld adjudication of Petitioner's guilt might be, her *nolo contendere* plea incontestably was tendered, and just as incontestably was accepted by the trial court. It is patent that unless and until the trial court accepted Petitioner's *nolo contendere* plea, the process represented by the trial court's imposition of sentence and penalty on June 14, 2011 (ALJ Ex. 1, at 1, 3, 6, 8) simply could not have begun. *Douglas L. Reece, D.O.*, DAB CR305 (1994); *Robert W. Emfinger, R.Ph.*, DAB CR92 (1990). Because Petitioner's plea of *nolo contendere* was accepted by the trial court, the acceptance of that plea constitutes a "conviction" within the meaning of sections 1128(a)(4) and 1128(i)(3) of the Act, and 42 C.F.R. § 1001.2, and does so independently of the basis provided by section 1128(i)(4) of the Act.

The second, third, and fourth of the four essential elements in a section 1128(a)(4) exclusion are proven here without serious argument. Records of the Court of Common Pleas show conclusively that the criminal proceedings against Petitioner began with the

events of April 2010, in which she attempted to use a forged prescription to obtain a supply of schedule II controlled substance painkillers. I.G. Exs. 3, 4. The charges immediately filed against Petitioner included both felonies and misdemeanors, but all were related to her use of the forged prescription for the controlled substance drug. I.G. Exs. 2, 3, 4, 5; ALJ Ex. 1. The Criminal Information to which Petitioner pleaded guilty is linked to her attempt by the date of the offense it charges, by the Criminal Complaint first filed in the prosecution, and by the transcript of her Preliminary Hearing in the Court of Common Pleas on October 13, 2010. I.G. Exs. 3, 4, 5. The classification of the crime to which Petitioner pleaded *nolo contendere* as a felony is established by the Court of Common Pleas' judgment and sentencing records. I.G. Ex. 2, at 1, 4. The nexus of Petitioner's admitted felony offense to the "unlawful manufacture, distribution, prescription, or dispensing of a controlled substance" as required by section 1128(a)(4) of the Act, and the crime's having occurred after 1996, are fully established on the record before me.

Petitioner's hearing request raised another issue not further elaborated in her briefing. She complained that a substantial period elapsed between the conclusion of the criminal case in June 2011 and the I.G.'s final action of January 2013 in determining to exclude her from the protected programs. Petitioner's complaint may be reasonable as a matter of fairness, for significant consequences may flow from the I.G.'s delay in beginning the exclusion process. The I.G.'s unexplained delay in this case is approximately 18 months. When seen against the period of exclusion that the I.G. seeks to impose — five years — the delay obviously amounts to a significant *de facto* enhancement of that period. My views on this issue in general have not changed since *Stephen Michael Cook, M.D.*, DAB CR1234 (2004), and have been restated in *Abelardo Lecompte-Torrez*, DAB CR2379, at 7 (2011); *Marilyn June McCullough*, DAB CR1931, at 6 (2009); *Vivienne Esty-Fenton*, DAB CR1931, at 11 (2009); *Kimberly Mazzeo*, DAB CR1591, at 5 (2007); and *Dana William White*, DAB CR1495 (2006). So far, the effort to set rational limits on I.G. delays — or to discover the justifications for them — has not been pressed before an Article III court with vigor and tenacity sufficient to affect the law of this forum. *Randall Dean Hopp*, DAB No. 2166 (2008); *Kailash C. Singhvi, M.D.*, DAB No. 2138 (2007). And so, at least for now, the timing of the I.G.'s decision to begin the exclusion process remains entirely beyond review by the Board or any Administrative law Judge (ALJ) of

this forum. *Randall Dean Hopp*, DAB No. 2166; *Kailash C. Singhvi, M.D.*, DAB No. 2138; *Kevin J. Bowers*, DAB No. 2143 (2008); *Lisa Alice Gantt*, DAB No. 2065 (2007); *Thomas Edward*, DAB No. 1991; *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *David D. DeFries, D.C.*, DAB No. 1317 (1992); *Richard G. Philips, D.P.M.*, DAB No. 1279 (1991); *Samuel W. Chang, M.D.*, DAB No. 1198 (1990).[1]

Petitioner's Answer Brief raises a number of arguments based on her successful treatment for the substance abuse that led to her conviction, on the Pennsylvania State Board of Nursing's approval of her return to nursing work, on her unblemished record as a caregiver up to the time of her conviction, and on the expanding need for nurses in the future. P. Exs. 1-4. These are all significant points in a social context, and I intend no slight to Petitioner's successful efforts to address her problems, nor to her dedication to her chosen profession. But the operation of section 1128(a)(4) is mandatory: neither the I.G. nor I can act on Petitioner's arguments and avoid the statute's terms. *Charice D. Curtis*, DAB No. 2430, at 6 (2011). Neither the I.G. nor I can exercise the slightest discretion: the law requires Petitioner's exclusion once the essential elements have been proven, as they have here. The waiver provisions of section 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B), apply only when certain well-defined and strictly-limited administrative requirements have been met, and none of them have been met here.[2]

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[1] Although the I.G. may exercise no discretion whatsoever in determining *whether* to impose the exclusion sanction under section 1128(a) of the Act, he continues to enjoy absolutely unfettered latitude in deciding *when* to impose the sanction. The I.G.'s unexplained delay in this case is approximately 18 months, and, as I have noted, has at least the potential for significant consequences. But the I.G.'s delay in this case pales when measured against other unexplained delays given unremarked approval by the Board. In *Kailash C. Singhvi, M.D.*, DAB No. 2138, the Board acceded to the I.G.'s delay of five years and four months. In *Lisa Alice Gantt*, DAB No. 2065, the Board declared itself unable to question the I.G.'s delay of five years and 19 days. For what the observation may be worth, it would appear that the range of I.G. delays has expanded considerably since my review of them in *Stephen Michael Cook, M.D.*, DAB CR1234, and that it is now the Board itself whose *nihil obstat* is written on the very longest of those delays. Given the Board's present reading of the law, the I.G.'s timing can be the manifestation of random accident, purest whim, or cunningly-crafted design — and no judge of this forum may so much as wonder which of those factors shaped the determination, or why.

[2] Petitioner does not explicitly cite section 1128(c)(3)(B) as the basis for her waiver request, but she does quote that section's language with reference to an "essential

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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*, and 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 Petitioner's pleadings for any additional contentions that might raise a valid 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 apt 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 both undisputed and unambiguous. They 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 Erin Dalton 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)(4) of the Act, is SUSTAINED.

/s/
Richard J. Smith
Administrative Law Judge

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specialized service" in making her point, and so I conclude that she relies on that section's terms.