Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the case of:	)	
Johnnelle Johnson Bing,	)	Date: April 3, 2009
Petitioner,	)	
- v. -	)	Docket No. C-09-116
	)	Decision No. CR1938
The Inspector General.	)	

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition of the I.G.'s determination to exclude Petitioner *pro se* Johnnelle Johnson Bing from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s Motion and determination to exclude Petitioner are based on section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The facts in this case mandate the five-year exclusion, and for that reason, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner *pro se* Johnnelle Johnson Bing was a Medicaid provider in the State of Georgia. From July 2002 through March 2005, Petitioner engaged in a scheme in which she submitted fraudulent claims to the Georgia Medicaid program, obtaining payments in the amount of approximately $618,352, for perinatal and pregnancy-related services that were not provided. To facilitate her scheme, Petitioner also made false entries in the records of Medicaid recipients to indicate that she had provided such services.

On June 22, 2006, the Grand Jury sitting for the Superior Court, DeKalb County, Georgia handed up an indictment (DeKalb County Indictment) that charged Petitioner with one count of felony Medicaid Fraud, in violation of GA. CODE ANN. § 49-4-146.1(b).

On August 9, 2006, the Grand Jury sitting for the Superior Court, Columbia County, Georgia, handed up an indictment (Columbia County Indictment) that charged Petitioner with two felony counts of False Writings, in violation of GA. CODE ANN. § 16-20-20.

Petitioner appeared with counsel in the Columbia County Superior Court, Georgia, on June 11, 2007, and entered what is known colloquially as an "*Alford* plea" (a guilty plea tendered under the rubric of *North Carolina v. Alford*, 400 U.S. 25 (1970)) to the lesser included offense of count two of the Columbia County Indictment, a misdemeanor offense of willful destruction, alteration, or falsification of health records, in violation of GA. CODE ANN. § 16-10-94.1. Petitioner's guilty plea was accepted, and she was sentenced on the same day to a 12-month term of probation and required to pay a fine of $1,000, and a monthly supervision fee. As part of her plea agreement, Petitioner voluntarily agreed not to participate in the Medicare and Medicaid programs. The first count of the Columbia County Indictment was dismissed *nolle prosequi*.

Petitioner appeared with counsel in the DeKalb County Superior Court on July 13, 2007, and pleaded guilty to the lesser included misdemeanor offense of theft by taking, in violation of GA. CODE ANN. § 16-8-2.[1] Petitioner's plea was accepted, and she was sentenced to a 12-month term of probation and required to pay a fine of $1,000, and other fees. The amount of restitution owed by Petitioner remained open until the Superior Court judge issued a Consent Order on March 7, 2008, stating that Petitioner owed restitution in the amount of $4,468.40 to the Georgia Department of Community Health[2], and ordering Petitioner to pay that amount.

On September 30, 2008, the I.G. notified Petitioner that she was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for the mandatory minimum period of five years. Acting *pro se*, Petitioner timely sought review of the I.G.'s action by letter dated November 25, 2008.

I convened a telephonic prehearing conference on December 17, 2008, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing them. By Order of December 18, 2008, I established a schedule for the submission of documents and briefs. Pursuant to the terms of paragraph 8 of that Order, the record in this case closed March 5, 2009. Petitioner has continued to act *pro se* throughout these proceedings.

---

[1] The court's entry of judgment does not provide the specific statute to which Petitioner pleaded guilty; however, the I.G., in his brief, indicated that GA. CODE ANN. § 16-8-2 is the statute pertaining to "Theft by taking." I.G. Brief at 5 n.7.

[2] The Georgia Medicaid program is also known as the Georgia Department of Community Health and the Department of Medical Assistance. *See* I.G. Ex. 3.

The evidentiary record on which I decide the issues before me comprises 11 exhibits. The I.G. proferred eight exhibits marked I.G. Exhibits 1-8 (I.G. Exs 1-8). With her response, Petitioner attached documents consisting of two letters attesting to her good character and service to the community, and a copy of the transcript of the sentencing colloquy before the judge in the Columbia County Superior Court, Georgia. Because Petitioner failed to mark these three documents properly as exhibits, I have marked them as Petitioner's Exhibits 1-3 (P. Exs. 1-3). In the absence of objection, I have admitted I.G. Exs. 1-8 and P. Exs. 1-3 as designated.

II. Issues

The issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the 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)(1) of the Act; and

2. Whether the proposed five-year 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, section 1128(a)(1) of the Act mandates Petitioner's exclusion. A five-year period of exclusion is reasonable as a matter of law, since it is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B).

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of 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 terms of section 1128(a)(1) are restated in regulatory language at 42 C.F.R. § 1001.101(a). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a . . . State . . . court, regardless of . . . whether the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; "when there has been a finding of guilt against the individual . . . by a . . . State . . . court," section 1128(i)(2) of the Act; or

"when a plea of guilty or nolo contendere by the individual . . . has been accepted by a . . . State . . . court," section 1128(i)(3) of the Act. These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) is mandatory, and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act; 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 her plea of guilty on June 11, 2007, in the Columbia County Superior Court, Georgia, Petitioner Johnnelle Johnson Bing was found guilty of the criminal offense of willful destruction, alteration, or falsification of health records, in violation of GA. CODE ANN. § 16-10-94.1.

2. The accepted guilty plea, finding of guilt, and judgment of conviction described above constitute a "conviction" within the meaning of sections 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act, and 42 C.F.R. § 1001.2.

3. On her plea of guilty on July 13, 2007, in the DeKalb County Superior Court, Georgia, Petitioner Johnnelle Johnson Bing was found guilty of the criminal offense of theft by taking, in violation of GA. CODE ANN. § 16-8-2.

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

5. A nexus and a common-sense connection exist between the criminal offenses to which Petitioner pleaded guilty and of which she was found guilty, as noted above in Findings 1 through 4, and the delivery of an item or service under a State health care program. I.G. Exs. 3-7. *Berton Siegel, D.O.,* DAB No. 1467 (1994).

6. By reason of Petitioner's convictions, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(1) of the Act, to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

7. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, it is not unreasonable. Section 1128(c)(3)(B) of the Act; 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 warranted 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 essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (Medicare) or any state health care program. *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367 (1992); *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005); *see Russell Mark Posner*, DAB No. 2033, at 5-6 (2006).

The first essential element, the fact of Petitioner's conviction, is conclusively established by the court records, which include the DeKalb County and Columbia County Indictments (I.G. Exs. 3, 4), the transcript of the sentencing colloquy before the Columbia County Superior Court (I.G. Ex. 5), and the courts' Sentence and Judgment documents, by which the final disposition and sentence were recorded for each of Petitioner's criminal offenses. I.G. Exs. 6, 7.

The acceptance of Petitioner's guilty pleas by the Columbia County and DeKalb County Superior Courts satisfies the definition of "conviction" set out at section 1128(i)(3) of the Act. The Courts' findings of guilt and their entries of judgment satisfy the definitions of "conviction" set out at sections 1128(i)(1) and (2) of the Act. The I.G. has proved the first essential element.

It is true that the statutes that Petitioner pleaded guilty to violating, GA. CODE ANN. § 16-10-94.1 ("Destruction, alteration, or falsification of health records") and GA. CODE ANN. § 16-8-2 ("Theft by taking"), do not on their face reveal a specific link to the Georgia Medicaid program. However, the factual recitations in both the DeKalb County and Columbia County Indictments leave no doubt that Petitioner's offenses of which she was convicted arose from conduct that was obviously "related to" the Medicaid program within the purview of section 1128(a)(1).

The DeKalb County Indictment explicitly describes how Petitioner billed the Georgia Medicaid program for perinatal and pregnancy-related services that she had not provided as claimed, and how she made false entries into the records of approximately 99 Medicaid recipients in an attempt to document perinatal and pregnancy-related services that she had not provided. I.G. Ex. 3. That Petitioner's subsequent conviction of the misdemeanor offense of theft by taking is based on the criminal conduct outlined in the

DeKalb County Indictment cannot be disputed, and is further evidenced by the court's entry of judgment, which lists Petitioner's offense as "Medicaid Fraud." I.G. Ex. 7.

Additional details of Petitioner's scheme are set forth in the Columbia County Indictment, which outlines how Petitioner fabricated the patient records of 16 Medicaid recipients to falsely reflect that she had provided perinatal and pregnancy-related services when in fact, she had not. I.G. Ex. 4. There can be no dispute that Petitioner's subsequent conviction for willful destruction, alteration, or falsification of medical records was based on the criminal acts described in the Columbia County Indictment.

The submission of false claims to the Medicare and Medicaid programs has been consistently held to be a program-related crime within the reach of section 1128(a)(1). *Jack W. Greene,* DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan,* 731 F. Supp. 835 (E.D. Tenn. 1990); *Julius Williams, III*, DAB CR1464 (2006); *Kennard C. Kobrin*, DAB CR1213 (2004); *Norman Imperial*, DAB CR833 (2001); *Egbert Aung Kyang Tan, M.D.*, DAB CR798 (2001); *Lorna Fay Gardner*, DAB CR648, *aff'd*, DAB No. 1733(2000); *Mark Zweig, M.D.*, DAB CR563 (1999); *Alan J. Chernick, D.D.S.*, DAB CR434 (1996). Moreover, there can be little question that falsifying patient records of Medicaid recipients is an offense related to the delivery of a health care item or service. *See Mary Jo Izzo*, DAB CR1136 (2004); *Rose Mary Maye,* DAB CR1028 (2003). I find that the factual underpinnings of Petitioner's offenses demonstrate the required nexus and common-sense connection between Petitioner's criminal acts and the Medicaid program. *Berton Siegel, D.O.*, DAB No. 1467 (1994).

Moreover, the Consent Order Petitioner entered into with the State of Georgia shows that Petitioner was ordered to pay restitution in the amount of $4,468.40 to the Georgia Medicaid program. I.G. Ex. 8. As I have written elsewhere, if an individual has been convicted of a criminal offense, then proof that any sentence based on that conviction included the payment of restitution to a protected program creates a rebuttable presumption of a nexus or common-sense connection between the conviction and the delivery of an item or service under the program. *Alexander Nepomuceno Jamias*, DAB CR1480 (2006). Thus, based on the exhibits described above, the second essential element is likewise established by the record.

Petitioner, in her *pro se* defense to the proposed exclusion, proclaims that she did not enter a guilty plea. She asserts:

> No guilty plea was made – an Alford plea was made – the judge stated in his summary that I would be treated as if I was "almost guilty." Agreement made with the State of Georgia for restitution and a one year suspension @ time of plea. Restitution has been paid.

Petitioner's Brief at 1.

In exclusion proceedings like this one, any form of collateral attack on predicate convictions is categorically precluded by regulation at 42 C.F.R. § 1001.2007(d), and that categorical preclusion has been affirmed repeatedly by the Departmental Appeals Board (Board). *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Susan Malady, R.N.*, DAB No. 1816 (2002); *Dr. Frank R. Pennington, M.D.*, DAB No. 1786 (2001); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Paul R. Scollo, D.P.M.*, DAB No. 1498 (1994); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993).

Moreover, Petitioner's assertion that her *Alford* plea did not equate to a guilty plea is misguided and must fail. Petitioner's June 11, 2007 *Alford* plea was a guilty plea. *North Carolina v. Alford*, 400 U.S. 25, 37 (1980). Convictions based on *Alford* pleas have without exception been held sufficient predicate convictions in exclusion proceedings based on section 1128(a) of the Act. *Charles W. Wheeler and Joan K. Todd*, DAB No. 1123 (1990); *Stella Remedies Lively*, DAB CR1369 (2005); *Charles D. Howard, M.D.*, DAB CR1362 (2005); *Charles Philip Colosimo*, DAB CR1225 (2004); *John Y. Salinas, M.D.*, DAB CR1117 (2003); *Ethel Ann Arita*, DAB CR1052 (2003); *Steven Alonzo Henry, M.D.*, DAB CR638 (2000). That rule has been in force at least since *Kenneth Krulevitz, M.D.*, DAB CR24 (1989).

Further, the sentencing colloquy among the Columbia County Superior Court judge, Petitioner, and Petitioner's counsel demonstrates that the judge carefully questioned Petitioner to determine that she understood the potential consequences of her plea. In the interest of providing context and illumination, I have set out part of the colloquy below:

> The Court: You understand that by pleading guilty you're waiving your right to a jury trial?
>
> The Defendant [Petitioner]: Yes.
>
> The Court: And even though this is a misdemeanor, it is a negotiated plea, from what I understand; is that correct?
>
> The Defendant [Petitioner]: Yes, sir.
>
> The Court: Now, by pleading guilty, you're waiving certain fundamental rights that you have. That would be a right to a trial by jury. The Clerk of Court would subpoena jurors to come here today. The State would have a right to challenge certain jurors. Your lawyer would have a right to challenge certain jurors according to legal procedure. . . . you understand that?
>
> The Defendant [Petitioner]: Yes, sir.

The Court: But you're giving up those rights by pleading guilty; do you understand that?

The Defendant [Petitioner]: Yes.

The Court: Now, has anyone intimidated, threatened or forced you to plead guilty?

The Defendant [Petitioner]: No, sir.

The Court: Your lawyer has explained to you all your civil rights, constitutional rights and due process rights, has he not?

The Defendant [Petitioner]: Yes.

The Court: And you're satisfied with the work your lawyer's performed?

The Defendant [Petitioner]: Yes, sir.

The Court: Okay. [Petitioner's counsel], do you understand that she's entering this plea – do you think she's entering it freely and voluntarily?

[Petitioner's counsel]: Yes, Your Honor, as long as the Court is still aware pursuant to *North Carolina versus Alpha* [sic], a Supreme Court decision, we're entering an *Alpha* plea and I've explained to her the significance of an *Alpha* plea.

The Court: *Alford* plea. She's not admitting, she's not denying, but thinking that –

[Petitioner's counsel]: It's in the best interest of her to enter into –

The Court: And you understand I'm going to treat that just almost like a guilty plea; there's going to be a fine imposed and there's going to be the plea agreement that y'all have worked out, basically is what I'm going to do?

The Defendant [Petitioner]: Yes, sir.

The Court: All right. Is this the *Alford* plea you're entering into, A-L-F-O-R-D?

[Petitioner's counsel]: Yes, sir. . . .

* * *

> The Court: . . . All right, I'm going to accept the plea. And it's my understanding that as part of the plea agreement she'll pay a thousand dollar fine. Do you have a time limit on when she will pay that?

I.G. Ex. 5, at 6-7; P. Ex. 3, at 10-13.

It is evident from the foregoing excerpt that at no time did the Columbia County Superior Court judge suggest in any way that Petitioner would be found "almost guilty." Rather, the colloquy shows that the judge repeatedly made Petitioner aware of the fact that she would be pleading guilty by entering an *Alford* plea. Upon concluding that Petitioner's plea was voluntary and informed, the judge stated that he would "accept the plea," and proceeded to impose a sentence of probation and a fine based on the plea.

The remainder of Petitioner's defense is found in the two letters she submitted, which I have marked as P. Exs. 1-2. One letter is from a Georgia state legislator, and the other letter is from the office manager of a medical practice for whose patients Petitioner had provided services. Both letters attest to Petitioner's good character and service to the community.

I have no wish to minimize the testimonials offered by the authors of the two exhibits, although it seems somewhat surprising that a state lawmaker would involve himself with this mandatory federal exclusion process. But nothing in them is sufficient to negate the mandatory application of section 1128(a)(1). Petitioner must be excluded from participation in Medicare, Medicaid, and all other federal health care programs. The five-year period of exclusion proposed in this case is the statutory minimum required by section 1128(c)(3)(B) of the Act. As a matter of law, it is not unreasonable. 42 C.F.R. § 1001.2007(a)(2); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002); *Krishnaswami Sriram, M.D.*, DAB CR1463 (2006), *aff'd*, DAB No. 2038 (2006).

Because Petitioner appears here *pro se*, I have taken additional care in reading her submissions, 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 for arguments or contentions that might raise a valid defense to the proposed exclusion. I have found nothing that could be so construed.

Resolution of a case by summary disposition is appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *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, clear, and unambiguous. They support summary disposition as a matter of law, and this Decision is issued accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Johnnelle Johnson Bing 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)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is thereby affirmed.

/s/
Richard J. Smith
Administrative Law Judge