Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Vivienne Esty-Fenton,	)	Date: March 25, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-699
	)	Decision No. CR1931
The Inspector General.	)	
	)	

DECISION

This matter is before me on the Inspector General's (I.G.) Motion for Summary Affirmance of the I.G.'s determination to exclude Petitioner Vivienne Esty-Fenton 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 the terms of section 1128(a)(2) of the Social Security Act (Act).

I. Procedural Background

During the summer of 2005, Petitioner Vivienne Esty-Fenton was employed as a nurse and as the Assistant Director of Nursing (ADON) at the Eastchester Rehabilitation and Care Center (Eastchester), located in Bronx, New York. Based on events stemming from her employment at Eastchester on June 2, 2005, the Medicaid Fraud Control Unit of the New York State Attorney General's Office filed a four-count felony complaint against Petitioner and a co-defendant. On June 20, 2006, Petitioner entered a plea of guilty to Attempted Falsifying Business Records in the First Degree, in violation of N.Y. PENAL LAW § 110-175.10, a class A misdemeanor. Petitioner's plea was accepted and she was convicted and sentenced to a one-year conditional discharge by the Supreme Court of the State of New York, Bronx County. Following the conviction, Petitioner was excluded from Medicaid program participation by the New York State Department of Health for a two-year period commencing July 11, 2006.

On June 30, 2008, the I.G. notified Petitioner that she was being excluded from participation in Medicare, Medicaid and all federal health care programs pursuant to section 1128(a)(2) of the Act for a period of five years.

Petitioner timely requested a hearing before an administrative law judge (ALJ) on August 27, 2008, indicating that she was challenging the basis of the exclusion and the commencement of the exclusionary period. The request for hearing[1] was received at the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB or the Board) on August 28, 2008. The case was docketed as C-08-699 and assigned to me on August 29, 2008, for hearing and a decision. I convened a telephonic prehearing conference on September 24, 2008, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing those issues. The parties were advised that based upon review of the file, it appeared that the issues could be addressed in summary fashion. The parties were further advised that if I found that the issues could not be addressed in summary fashion, an evidentiary hearing would be scheduled. There being no objection, I issued an initial prehearing order to the parties providing instructions in how the parties were to file their written submissions. *See* Order (October 1, 2008). The I.G.'s Brief-in-Chief (I.G. Br.) and five exhibits identified as I.G. Exs. 1-5 were filed on October 30, 2008. On December 1, 2008, Petitioner filed her brief (P. Br.) and six exhibits, identified as P. Exs. 1-6. The I.G. filed a Reply Brief (Reply) on December 16, 2008, with three exhibits which the I.G. incorrectly marked as I.G. Exs. 1-3. Petitioner filed a Response Brief (Response) on December 31, 2008.

On January 8, 2009, I convened a second telephonic prehearing conference in order to seek clarification and provide direction following the receipt of the I.G.'s Reply and Petitioner's Response. The exhibits the I.G. filed with the Reply were incorrectly marked; therefore, they were returned to the I.G. for renumbering in sequence with the exhibits the I.G. had already proffered. Petitioner was also advised during the conference that I lack jurisdiction to consider the allegation she raised in her Response that any delay in the I.G.'s determination to exclude her was an abuse of discretion. Petitioner was further advised that if she wished to develop the record for any prejudice she suffered as a result of the I.G.'s timing, she was encouraged to do so in her Final Response Brief. *See* Order (January 8, 2009). The I.G. re-filed its Reply and exhibits on January 14, 2009 with revised exhibit numbers identified as I.G. Exs. 6-8; and on January 30, 2009, Petitioner filed her Final Response Brief amending her December 31, 2008 Response and attaching

[1] With her request for hearing, Petitioner attached six exhibits, identified as exhibits A-F. The attachments remain part of the record and attached to the request; however, the same exhibits were resubmitted by Petitioner with her brief and have been appropriately identified as Petitioner's exhibits in the record.

10 exhibits, identified as P. Exs. 7-16. The I.G. filed its Final Reply Brief (Final Reply) on February 17, 2009.

Petitioner objected to my receiving the exhibits the I.G. proffered with its December 16, 2008 Reply. Petitioner states that my Order of October 1, 2008, required the parties to file their exhibits with their opening brief. P. Response at 2-3. During the January 8, 2009 prehearing conference, the exhibits the I.G. initially proffered with its Reply were not accepted by me. The I.G. was given the opportunity to re-file those exhibits, and Petitioner was also afforded the opportunity to file a Final Response Brief which she did, along with 10 additional exhibits. Therefore, I overrule Petitioner's objection.

All briefing is now complete, and the record in this case closed on February 18, 2009. The evidentiary record before me on which I decide the issues contains the parties' pleadings and the admitted exhibits which include I.G. Exs. 1-8 and P. Exs 1-16.

II. Issues

The issues in this case 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)(2) of the Act; and

2. Whether the proposed five-year period of exclusion is unreasonable.

I resolve both issues in favor of the I.G.'s position. Because her predicate conviction has been established, section 1128(a)(2) of the Act mandates Petitioner's exclusion. A five-year period of exclusion is reasonable as a matter of law, for 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)(2) of the Act, 42 U.S.C. § 1320a-7(a)(2), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs for a minimum of five years of any "individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." The statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion. The terms of section 1128(a)(2) are restated in regulatory language at 42 C.F.R. § 1001.101(b).

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;". . . "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; or "when the individual . . . has entered into participation in a . . . deferred adjudication . . . program where judgment of conviction has been withheld," section 1128(i)(4) of the Act. 42 U.S.C. §§ 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

N.Y. PENAL LAW § 110-175.10 provides:

> A person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof.

An exclusion based on section 1128(a)(2) of the Act is mandatory and the I.G. must impose it for a minimum period of five years. Act § 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 that statutory provision.

The standard of proof in this case is the preponderance of the evidence. Petitioner bears the burden of proof and persuasion on any affirmative defenses and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

IV. Findings and Conclusions

I find and conclude as follows:

1. On her plea of guilty on June 20, 2006, in the Supreme Court of the State of New York, Bronx County, Petitioner was found guilty of the class A misdemeanor offense of Attempted Falsifying Business Records in the First Degree, in violation of N.Y. PENAL LAW § 110-175.10. I.G. Exs. 2, 4.

2. Petitioner was sentenced on her plea in the Supreme Court of the State of New York, Bronx County, on June 20, 2006. I.G. Exs. 2; 4, at 6.

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

4. A nexus and a common-sense connection exist between the criminal offense to which Petitioner pleaded guilty and of which she was convicted, as noted above in Findings 1, 2 and 3, and the delivery of an item or service under Medicare or a State health care program. I.G. Exs. 3; 4, at 3-4; *Berton Siegel D.O.*, DAB No. 1467 (1994).

5. Petitioner was excluded from the New York Medicaid Program by the State of New York, Office of the Medicaid Inspector General from July 11, 2006 through July 11, 2008, based upon her June 20, 2006 conviction. Petitioner was notified that her program exclusion was based upon her conviction "of a crime relating to the furnishing or billing for medical care, services or supplies." P. Ex. 5, at 1; *see also* P. Ex. 4.

6. On June 30, 2008, the I.G. notified Petitioner that she was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, based on the authority set out in section 1128(a)(2) of the Act. I. G. Ex. 1.

7. Through counsel, Petitioner perfected her appeal from the I.G.'s action by filing a timely hearing request on August 27, 2008.

8. By reason of Petitioner's conviction, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(2) of the Act, 42 U.S.C. § 1320a-7(a)(2), to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

9. By reason of her conviction, Petitioner was subject to, and the I.G. was required to impose, the mandatory minimum five-year period of exclusion from Medicare, Medicaid, and all other federal health care programs. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(b).

10. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, it is therefore not unreasonable. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a); 1001.2007(a)(2).

11. 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 essential elements necessary to support an exclusion based on section 1128(a)(2) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the conviction must have been related to the neglect or abuse of patients; and, (3) the patient neglect or abuse to which an excluded individual's conviction related must have occurred in connection with the delivery of a health care item or service. *Neitra*

Maddox, DAB CR1218 (2004); *Maureen T. Kehoe*, DAB CR673 (2000); *Gabriel S. Orzame, M.D.*, DAB CR587 (1999); *Ann M. MacDonald*, DAB CR519 (1998); *Anthony A. Tommasiello*, DAB CR282 (1993).

The three essential elements necessary to support an exclusion based on section 1128(a)(2) are proven in the record before me. Although Petitioner does not directly challenge her criminal conviction, she does challenge the classification of the conviction as one relating to the neglect or abuse of patients and further disputes that the actions that were the basis of the conviction occurred in connection with the delivery of a health care item or service. P. Br. at 7-19. Finally, Petitioner further challenges the exclusionary period of five years in light of her two-year state exclusion from the Medicaid program which commenced on July 11, 2006, and asks that the federal exclusion run concurrently with the State exclusion.

A. The I.G. has a basis for Petitioner's exclusion.

1. Petitioner was convicted of a criminal offense.

The evidence of Petitioner's conviction of a criminal offense is clear and uncontradicted. I.G. Ex. 2. The evidence before me shows that Petitioner appeared with counsel in the Supreme Court of the State of New York and pleaded guilty to the crime of Attempted Falsifying Business Record, in violation of N. Y. PENAL LAW § 110-175.10. I.G. Ex. 4. The trial court's acceptance of her counseled plea is demonstrated by the fact that the trial court found Petitioner guilty and proceeded immediately to the imposition of sentence. I.G. Ex. 4; *see also* I.G. Ex. 2. Those events satisfy the definitions of "conviction" set out at sections 1128(i)(2) and 1128(i)(3) of the Act. The I.G. has proven the first essential element.

2. Petitioner's conviction was related to abuse or neglect of a patient.

The I.G. is mandated to exclude an individual convicted of a criminal offense that is "related to" patient abuse or neglect. Act § 1128(a)(2); 42 U.S.C. § 1320a-7(a)(2). Here, the I.G. has provided evidence establishing that Petitioner's conviction for her actions during her employment at a nursing facility involving falsifying both the medical chart and the facility records surrounding a resident's elopement was "related to abuse or neglect of a patient."

The felony complaint filed by the Medicaid Fraud Control Unit of the New York State Attorney General's office recites the name of the victim of Petitioner's neglect (herein R1); alleges that R1 was "an 82-year-old male who was unable to care for himself due to physical disability, mental disease;" and asserts that at the time of the crime, R1 was a resident at Eastchester. I.G. Ex. 3. The complaint further charges that while acting in

concert with a co-defendant who was also an employee of Eastchester, Petitioner "caused a false entry in the business records of Eastchester . . ., namely in the Nursing Notes and Treatment Record . . . and in the 24 Hour Resident Condition Report . . . ." The Complaint describes the alleged circumstances under which the offenses were committed. It alleges that on June 2, 2005, R1 was noted by staff as missing from the fourth floor of Eastchester. After staff searched the complete facility, the Registered Nurse (RN) Supervisor at Eastchester notified Petitioner, in her capacity as ADON, of the elopement. Petitioner, who later came to the facility, told the RN Supervisor not to call 911, and then proceeded to conduct a second search for R1 at the Eastchester facility. The police were not notified of R1's elopement until 30 to 45 minutes later. That same evening, Petitioner told the RN Supervisor that the resident was found in the basement, and then later that same evening, acknowledged that he was actually found by police on the Pelham Parkway. The Complaint notes that the Pelham Parkway is approximately one-half mile from the Eastchester facility. The RN Supervisor stated Petitioner then told her that if she were asked, the RN Supervisor was to tell the New York State Department of Health and the New York State Attorney General's Office that R1 had been found in the basement at the facility. The Complaint further states that on June 3, 2005, an LPN at Eastchester was directed by Petitioner's co-defendant, in the presence of Petitioner, to generate a 24 Hour Resident Condition Report entry for June 2, 2005 at 8:30 p.m., by copying the nursing notes and treatment record which Petitioner's co-defendant had rewritten with false information regarding R1's elopement. On July 5, 2005, the elopement was anonymously called into the New York State Department of Health. Petitioner is alleged then to have told an LPN at the facility that, if asked, the LPN should tell the Department of Health that R1 was found on the first floor of the facility. I.G. Ex. 3.

On June 20, 2006, during the plea-and-sentence proceedings in this matter, the District Attorney read out the charge in open court. A transcript of the plea-and-sentence hearing appears as I.G. Ex. 4, and it establishes a colloquy reflecting the facts which formed the basis of Petitioner's conviction:

> [O]n June 2nd 2005, at the *Eastchester Nursing Home*, which is located at 2700 Eastchester Road in the county of the Bronx, the defendants did falsify the *medical charts* and facility records pertaining to an *incident involving* the wandering of *a patient* outside of the facility.

I.G. Ex. 4, at 3 (emphasis added). Petitioner was then asked by the Court:

> THE COURT: Ms. Esty-Fenton, have you heard the statement made by the district attorney?
>
> THE DEFENDANT [Petitioner]: Yes.

> THE COURT: Is it true, accurate and correct in every respect as it describes your participation in the crime with which you're charged?
>
> THE DEFENDANT [Petitioner]: Yes.

I.G. Ex. 4, at 4. The Court accepted Petitioner's guilty plea and sentenced her to a conditional discharge. I.G. Exs. 2, 4.

Petitioner argues that I may not examine the underlying facts of her criminal conviction and must limit my review to her oral plea in order to determine the circumstances underlying her plea. Petitioner relies on two cases, *Carmencita Alhabsi*, DAB CR555 (1998) and *Michael S. Rudman, M.D.*, DAB No. 2171 (2008), to support her assertion. P. Br. at 8-10. I find Petitioner's assertions unavailing. The more appropriate line of authority on the point begins with *Narendra M. Patel, M.D.*, DAB No. 1736 (2000), and it provides that information extrinsic to the specific charge underlying a conviction may be relied on if it is credible and reliable. The facts behind the charge to which Petitioner pleaded guilty are clearly set out in the transcript of the plea agreement. When asked by the Court about the accuracy of the prosecutor's elocution outlining the charges to which she tendered her guilty plea, Petitioner agreed that the prosecutor's statement was accurate. The record clearly establishes the actions for which Petitioner pleaded guilty involved the falsification of medical charts and facility records relating to the wandering of a patient outside the facility. So, if Petitioner raises any doubt of the association between her plea and the facts charged in the original complaint, the transcript of the plea-and-sentence hearing removes that doubt. I.G. Ex. 4, at 3-4. The I.G. has offered clear and convincing evidence to show that the conviction in the record was tied to the events that led to the complaint, and the plea colloquy shows that Petitioner's actions involved neglect or abuse of a patient.

Petitioner advances the argument that in order for a falsification of records conviction to be related to abuse or neglect, the falsification must have had a direct impact on the rendering of care and treatment of the patient. Petitioner's argument fails. The facts before me are clear: (1) Eastchester was a nursing home facility; (2) Petitioner was employed by Eastchester as an ADON, and as a nurse; (3) R1 was a resident at Eastchester where he was receiving medical care and under the professional oversight and supervision of Petitioner when he eloped. On the evening of July 2, 2005, Petitioner was functioning in the capacity of ADON and was directly contacted by staff at the facility for guidance as to R1's elopement. In her role as ADON she was responsible for the oversight and physical care and safety of residents. As a medical professional responsible for R1's care, she attempted to falsify R1's medical chart and the facility's records regarding the elopement.

Moreover, Petitioner's argument avoids the obvious connection between the crimes with which she was charged and the crime to which she pleaded guilty. The crime of attempted falsifying business records to which she pleaded guility was not conjured from thin air. It is well-established that, in determining the elements of a crime for purposes of deciding whether the authority exists to exclude, one may look at the facts that form the basis for the charges that are filed against the excluded party. The often opaque language of a plea agreement or a judgment of conviction will be no impediment to finding authority to exclude where the agreement or judgment is clearly supported by other official records that lay out the elements of the crime.

Petitioner's assertion that falsification of medical records related to R1's elopement did not amount to abuse or neglect because R1 was not injured and the falsification did not create a risk of harm to R1 also fails. P. Br. at 15. Petitioner's assertion is belied by the record, and it is evident from the record that her actions in attempting to falsify R1's medical records to represent that he was not at risk of wandering outside the facility onto a parkway one-half mile from the facility served to place R1, an elderly resident who was unable to care for himself, in harm's way. Petitioner's conduct falls within the common and ordinary meaning of the term "neglect."

Moreover, in her role as an ADON, Petitioner had a responsibility to R1 to document information accurately in his medical records and facility records pertinent to his elopement. But here, Petitioner failed. If any resident's elopement tendencies are not clearly documented and if facility staff are, as a result, unaware that the resident has these tendencies and are therefore unable to plan accordingly, that resident is at risk of eloping from the facility again and heading into some unprotected hazard, in this case, the distant Pelham Parkway. Petitioner failed in her responsibility to care for R1 on June 2, 2005.

The I.G. is not obliged by the statute to prove that Petitioner personally and directly committed patient abuse or neglect. Rather, the I.G. meets his burden of proof by establishing that there was a conviction as defined by the Act and that the criminal offense of which Petitioner was convicted was *related to* patient neglect in connection with the delivery of a health care service. *See Westin v Shalala*, 845 F. Supp. 1446 (D. Kan. 1994). Petitioner maintains that she had only an indirect role in the falsification of the records. P. Br. at 13. However, this argument fails as it directly contradicts her plea. During the plea colloquy, Petitioner did not qualify or lessen her involvement, and when asked by the Court whether the statement that she attempted to falsify the medical records of R1 and facility records of Eastchester related to the elopement of R1 on June 2, 2005, was correct, she responded that it was. I.G. Ex. 4, at 3, 4.

The authority to exclude in this case derives from Petitioner's conviction. The conviction and those official records relating to it define the basis for the exclusion. The required nexus and common-sense connection between the crime of which Petitioner was convicted and the relationship to patient abuse or neglect has been established. Thus, the second essential element required to support the exclusion based on section 1128(a)(2) of the Act has been satisfied.

3. The actions that formed the basis of Petitioner's conviction were related to the delivery of a health care item or service.

The third essential element, the relation of Petitioner's conviction to the delivery of items or services under the Medicare program, appears in detailed recitations throughout I.G. Exs. 4, at 3, 4; 3, at 2-3. Those recitations explicitly and in detail describe how Petitioner was actively involved in the provision of health care services during the commission of her crime. Furthermore, the nexus between falsifying medical records and the delivery of health care, and Petitioner's role as the ADON and a nurse responsible for providing medical services to residents, are clearly within the meaning, scope, and intent of the Act.

The evidence establishes that Petitioner's conviction was of a criminal offense in connection with the delivery of a health care item or service. Specifically, she was assisting in and overseeing the facility's response to the elopement of a resident of the facility. In doing so, she made and caused to be made false statements that affected the course of the facility's response. There is an obvious nexus and common-sense connection between the crime of which Petitioner was convicted and the delivery of a health care item or service. *Berton Siegel, D.O.*, DAB No. 1467. The I.G. has proven the third element.

B. Petitioner's five-year exclusion is not unreasonable.

Petitioner also cites factors in her case that she believes mitigate her role in the charges of which she was convicted. She argues that her plea of guilty to a misdemeanor, instead of the felonies originally charged, is evidence of the lack of severity with which both the prosecution and the Court viewed her conduct. She makes a similar argument related to the sentence she received, "a mere conditional discharge, with no conditions attached; and that her license to practice was suspended for just a two-month period and not revoked." P. Response at 12-13; Petitioner's Request for Hearing at 2, 3.

The factors Petitioner advances here provide no support for her position in this forum. 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). Neither the Board nor I may reduce it. *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).

Having determined that the I.G. had a basis for excluding Petitioner, I now review Petitioner' challenge to the date on which the exclusionary period began. She asks that it run in a manner beginning as the same time as her state Medicaid program exclusion. Petitioner states that the timing of the I.G's five-year exclusion, being two years after the commencement of her state exclusion, in effect makes the period of her exclusion a total of seven years rather than five. Petitioner asks that her five-year exclusion be reduced to an amount of time essentially concurrent with her state exclusion. Furthermore, Petitioner asks that I take into consideration her employment history subsequent to her plea and conviction, arguing that the exclusion for a five-year period would create "an extreme hardship" for her, would be "fundamentally unfair," and would impose a hardship on her family. Petitioner's Request for Hearing at 3, 4; P. Br. at 20; P. Final Response at 2.

Neither the statute nor the regulations require the I.G. to act promptly once an individual has become subject to exclusion. *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993). An I.G. exclusion imposed after substantial delay, and even well after the beginning of other sanctions to which a petitioner may be subject, is in no way any less valid, even if the results of that delay are enough to shame reason and conscience. An ALJ cannot adjust the effective date of a validly-imposed exclusion by invoking principles of even the most basic fairness. *See, e.g., Kimberley Mazzeo*, DAB CR1591 (2007); *Stephen Michael Cook, M.D.*, DAB CR1234 (2004). An unbroken line of authority spanning nearly two decades places the timing of the I.G.'s action completely beyond my review here. *Randall Dean Hopp*, DAB No. 2166 (2008)*; Kevin J. Bowers*, DAB No. 2143 (2008); *Kailash C. Singhvi*, DAB No. 2138 (2007); *Thomas Edward Musial*, DAB No. 1991 (2005); *Samuel W. Chang, M.D.*, DAB No. 1198 (1990).

Petitioner has been afforded an opportunity to develop – for purposes of an appeal to the Article III judiciary, if she chooses – the record regarding her objection to the timing of the I.G.'s exclusion action and her assertion of an abuse of discretion by the I.G. *See* Order (October 1, 2008). I note that although I do not decide this issue, it is properly preserved for the record. Petitioner asks that I evaluate the delay on the part of the I.G. in excluding Petitioner. P. Br. at 20. However, since I have no authority to review the I.G.'s exercise of his discretion, it follows that I cannot weigh and decide facts related to that exercise of discretion even if some of those facts appear in this record. Once the I.G. has exercised his discretion to impose an exclusion, the regulation fixes the effective date of the exclusion at 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b).

Petitioner's conviction, as I have observed above, satisfied the three elements essential in a proceeding under section 1128(a)(2). Both parties have moved for summary judgment in this matter. 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 in favor of the I.G.'s position as a matter of law. This Decision issues accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s motion for summary affirmance should be, and it is, **GRANTED**. The I.G.'s exclusion of Petitioner Vivienne Esty-Fenton 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)(2) of the Act, 42 U.S.C. § 1320a-7(a)(2), is thereby affirmed**.**

/s/
Richard J. Smith
Administrative Law Judge