

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Danielle Lyn Timkovich,)	Date: May 27, 2008
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-259
)	Decision No. CR1793
The Inspector General.)	
_____)	

DECISION

Danielle Lyn Timkovich (Petitioner) appeals the decision of the Inspector General (I.G.), made pursuant to section 1128(a)(3) of the Social Security Act (Act), to exclude her from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner. The five-year exclusion is the mandatory minimum period as a matter of law.

I. Background

The facts are not in dispute. In 2006, while working as a pharmacy intern at Kroger Pharmacy in Sylvania, Ohio, Petitioner stole drugs from the pharmacy for her own personal use. Petitioner Exhibit (P. Ex.) 1, at 6-8, 18-19; I.G. Ex. 5. On June 1, 2006, she pled guilty in Ohio State Court to six counts of felony theft by deception. *Id.*

In a letter dated December 31, 2007, the I.G. notified Petitioner that, because of the felony conviction, she would be excluded from program participation for five years pursuant to section 1128(a)(3) of the Social Security Act (Act). On January 23, 2008, Petitioner filed a timely request for review, and the matter has been assigned to me for resolution. The parties agree that this matter should proceed on their written submissions and that an in-person hearing is not necessary. Order at 2 (March 5, 2008); Petitioner Brief (P. Br.) at 6.

The parties have submitted their briefs. Attached to the I.G.'s brief are I.G. Exhibits (I.G. Exs.) 1-7. Attached to Petitioner's brief (P. Br.) are Petitioner Exhibits (P. Exs.) 1-3. There being no objections, I.G. Exs. 1-7 and P. Exs. 1-3 are admitted into evidence.

II. Issue

The sole issue before me is whether the I.G. had a basis upon which to exclude Petitioner from participation in the Medicare, Medicaid, and all federal health care programs. This depends on whether the offenses for which she was convicted were “[i]n connection with the delivery of a health care item or service.” 42 C.F.R. § 1001.101(c)(1) (2005). The length of the period of exclusion is not an issue because the I.G. imposed the statutory minimum.

III. Finding

Petitioner must be excluded for five years because she was convicted of a felony relating to theft in connection with the delivery of a health care item, within the meaning of section 1128(a)(3) of the Act.¹

Under the statute and regulations, an individual convicted of felony theft in connection with the delivery of a health care item must be excluded from participation in federal health care programs for a minimum of five years. Act, § 1128(a)(3); 42 C.F.R. § 1001.101(c). Petitioner points out that she was found eligible for intervention in lieu of conviction, but concedes that the state court determination nevertheless falls within the statutory definition of “conviction.” P. Br. at 2.

Petitioner nevertheless argues that she was not convicted of any crime committed “[i]n connection with the delivery of a health care item.” 42 C.F.R. § 1001.101(c)(1). She recognizes the line of Departmental Appeals Board cases holding that theft of drugs by a pharmacist from his employer constitutes theft in connection with the delivery of a health care item, but characterizes as “overly broad” the Board's reading of the statute. P. Br. at 5. In Petitioner's view, she committed no crime with respect to the *delivery* of a health care item because the drugs were store property that had not been prescribed to any patient, and she kept them for her own personal use. *Id.* I reject Petitioner's strained reading of the statute.

¹ I make this one finding of fact/conclusion of law to support my decision in this case.

The Board's reasoning in finding the requisite "common sense connection" in cases involving theft by pharmacy employees has been as follows: the pharmacy obtains health care items for the purpose of delivering them to members of the general public in order to meet their medical needs. When an employee pharmacist takes one of those drugs, he interferes with the delivery of that item. "[T]heft of [a] drug while under the guise of performing his professional responsibilities is clearly the requisite common sense 'connection' to health care delivery that section 1128(a)(3) requires." *Erik D. DeSimone, R.Ph.*, DAB No. 1932 at 3 (2004) (where the petitioner pled guilty to theft of a controlled substance and paid \$2,500 in restitution); *see also, Kevin J. Bowers*, DAB No. 2143 (2008); *Robert F. Tschinkel, R.Ph.*, DAB CR1323 (2005); *Thomas A. Oswald, R.Ph.*, DAB CR1216 (2004).

I find the Board's reasoning sound. To accept Petitioner's view, I would have to conclude that pharmacies obtain and stock drugs for some purpose other than to deliver them to consumers. I can think of no such purpose, and Petitioner has not suggested one. She was convicted of stealing drugs intended for consumers, and her conduct therefore falls within the ambit of section 1128(a)(3). I therefore sustain the exclusion.

IV. Conclusion

For these reasons, I conclude that the I.G. has a basis for excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, and I sustain the five-year exclusion.

/s/

Carolyn Cozad Hughes
Administrative Law Judge