Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Catherine Ann Fee,	)	Date: May 17, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-97
	)	Decision No. CR1598
The Inspector General.	)	
	)	

DECISION

Catherine Ann Fee (Petitioner) appeals the decision of the Inspector General (I.G.), made pursuant to section 1128(a)(4) 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, and that the statute mandates a minimum five-year exclusion.

I. Background

By letter dated September 29, 2006, the I.G. notified Petitioner of his decision to exclude her from program participation for five years. The letter explained that the exclusion action was taken pursuant to section 1128(a)(4) of the Act because Petitioner was convicted of a felony offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Exhibit (I.G. Ex.) 1. In a letter dated November 10, 2006, Petitioner timely requested review, and the matter was assigned to me for resolution. I held a telephone prehearing conference on January 4, 2007, at which Petitioner was represented by counsel. At that time, Petitioner conceded that she had been convicted, but maintained that her conviction was not related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The parties agreed that the issues before me were legal issues for which an in-person hearing is not required and we set a briefing schedule. Order (January 4, 2007).

Pursuant to my scheduling order, the I.G. submitted his Brief in Support of Exclusion (I.G. Br.) with six exhibits attached, I.G. Exs. 1 - 6. Petitioner filed her response (P. Br.), submitting no additional exhibits. The I.G. submitted a reply brief (I.G. Reply) with two additional exhibits attached, I.G. Exs. 7 - 8. Petitioner has objected to my admitting several of the I.G.'s proposed exhibits: I.G. Exs. 3, 4, 7, and 8. For reasons discussed below, I overrule Petitioner's objections and admit into evidence I.G. Exs. 1 - 8.

II. Issue

The sole issue before me is whether the I.G. had a basis upon which to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs. Because an exclusion under section 1128(a)(4) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue.

III. Discussion

I make findings of fact and conclusions of law to support my decision in this case. I set forth each finding below, in italics, as a separately numbered or lettered heading.

A. Petitioner was convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, within the meaning of section 1128(a)(4) of the Act.

Petitioner was a pharmacist licensed by the State of New Jersey. I.G. Ex. 6. On December 16, 2005, she pled guilty in state court to one count of third degree conspiracy/obtaining a controlled dangerous substance (xanax and/or vicodin) by fraud. She engaged in the criminal conduct from March 19, 2004 to January 4, 2005. I.G. Exs. 2, 5. The Court accepted her plea and sentenced her to three years probation, ordered her to surrender her New Jersey Pharmacy license for a period of three years, make restitution to Eckerd Drugs in an unspecified amount (already satisfied) and to CVS Pharmacy in the amount of $1,229.81. I.G. Ex. 7. The Court also imposed some minimal fines. I.G. Ex. 5.

Section 1128(a)(4) of the Act requires that any individual or entity convicted of a felony criminal offense that occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996 (August 21, 1996) "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance" be excluded from all federal health care programs.[1]

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[1] "Federal health care program" is defined in section 1128B(f) of the Act as any plan or program that provides health benefits, whether directly, through insurance, or

1. Petitioner was convicted of a felony.

Petitioner first argues that she was not convicted of a felony. Apparently, in 1979, the State of New Jersey redefined its non-capital offenses as either "crimes" or the less serious "disorderly persons offenses." N.J. Stat. § 2C:1-4(a)&(b). The category of "crimes" is further subdivided into degrees, from the first degree (the most aggravated) to the fourth degree (the least aggravated). Petitioner's crime is classified as a "third degree crime," which carries a maximum penalty of three to five years imprisonment. N.J. Stat. §§ 2C:35-13; 2C:43-6(a)(3).

The I.G. points out that under federal law an offense is classified as a felony if it carries a maximum term of imprisonment of more than one year (18 U.S.C. § 3559), and urges me to apply a uniform federal standard in determining which state crimes constitute felonies. *See Carolyn Westin*, DAB No. 1381 (1993) (Exclusions should not hinge on state criminal justice policies). I need not even reach the issue, however, since, applying either the federal standard or New Jersey state law, the result would be the same: Petitioner was convicted of a felony. Under New Jersey law, crimes of the first, second, and third degree are "high misdemeanors" and crimes of the fourth degree are "misdemeanors." N.J. Stat. §§ 2C:43-1; 2C:1-4(d). New Jersey defines "felony" to include "high misdemeanors." N.J. Stat. § 2A:155-2. *See U.S. v. Brown*, 937 F.2d 68 (2d Cir. 1991) (a New Jersey crime in the third degree properly classified as a felony for purposes of a federal sentencing enhancement).[2]

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otherwise, which is funded directly, in whole or in part, by the United States Government, or any State health care program.

[2] Although I need not reach the issue here, it does not follow that a crime of the fourth degree would not be considered a felony under section 1128(a). In *U.S. v. Thomas*, 2 F.3d 79 (4th Cir. 1993), the Fourth Circuit refused to define a fourth degree crime as a misdemeanor for purposes of federal sentencing enhancement, noting that "a 'crime' of any degree is not necessarily equivalent to a misdemeanor, as this is the more serious of the two classifications of offenses in New Jersey's system." *See also State v. Doyle*, 42 N.J. 334 (1964) (under prior "high misdemeanor/misdemeanor" classification system, and misdemeanor punishable by more than one year in prison would be viewed as a common-law felony for purposes of justifying an arrest without warrant).

2. Petitioner's conviction related to the unlawful manufacture, distribution, prescription, or dispensing of controlled substances.

Petitioner next argues that the I.G. has not established that her conviction related to the manufacture, distribution, prescription, or dispensing of a controlled substance. In this regard, she challenges the I.G.'s reliance on extrinsic evidence. First, she objects to the admission of documents that she characterizes as "inadmissible hearsay": a police report (I.G. Ex. 3) and the transcript of a "voluntary statement" that she purportedly gave to the police, but which is signed only by the police secretary who transcribed the recorded statement. I.G. Ex. 4.

I am not bound by the Federal Rules of Evidence, although I may follow those rules in order to exclude evidence that is "unreliable" or for other legitimate purposes. 42 C.F.R. § 1005.17(b). The police report and Petitioner's voluntary statement are official documents, relevant to this inquiry, and thus admissible. I recognize that statements contained in a police report are often of questionable reliability, and I would therefore tend to afford them little – if any – weight.

With respect to the unsigned voluntary statement, Petitioner complains that the document lacks authenticating signatures. To the extent that this presents a legitimate attack on its authenticity, the I.G. corrects that purported defect by filing I.G. Ex. 8, a copy of the statement that has been signed by the interviewing police officer and a second officer present during the taking of the statement. Petitioner objects to the admission of this and a copy of Petitioner's Plea Form (I.G. Ex. 7), arguing that the I.G. "should not be allowed to submit new evidence in its rebuttal case where no evidence was presented by the defense." I reject this argument. The regulations governing these proceedings specifically direct me to permit rebuttal evidence. 42 C.F.R. § 1005.17(h). Here, although Petitioner presented no additional evidence, it essentially challenged the factual underpinnings of the I.G.'s case and the authenticity of documents the I.G. proffered, challenges that the I.G. might not reasonably have anticipated. I therefore consider I.G. Exs. 7 and 8 legitimate rebuttal, and they are admitted. I note also that Petitioner has not been prejudiced, inasmuch as she has had the opportunity to submit a surreply.

I also find the contents of I.G. Ex. 8 inherently reliable. Petitioner herself made the statement. Although not signed by her, the document is authenticated by the two police officers who were present when the statement was taken, as well as by the individual who transcribed the tape. Petitioner has not denied that she made the statement.

With respect to my consideration of the extrinsic evidence, the regulations specifically provide that evidence of crimes, wrongs, or acts other than those at issue is admissible to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme. 42 C.F.R. § 1005.17(g). It is well-settled that the I.G. may rely on extrinsic evidence to explain the circumstances of the offense of which a party is convicted. *Narendra M. Patel,* DAB No. 1736 (2000); *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Bruce Lindberg, D.C.*, DAB No. 1280 (1991).

Petitioner attempts to fit herself within *Chuoke*, by suggesting that the extrinsic evidence cited by the I.G. has nothing to do with Petitioner's conspiracy conviction. I disagree. Her conviction can encompass a broad array of activities. In this voluntary statement, she described in greater detail the existence of the scheme, her part in that scheme, and her motivation. She explained that she was working at CVS, and then at Eckerd Pharmacy. I.G. Ex. 8, at 3. While working there, she supplied to her boyfriend hundreds of pills:

> Q: You knew being a pharmacist that . . . each time you filled them, you shouldn't have been. . . . you knew that they weren't prescribed by a doctor and they were being filled by you anyhow.
>
> A: The ones you mentioned . . . yes.

Id. at 5. These admissions are consistent with the contents of her plea agreement, which conditions her sentence of probation upon her surrender of her pharmacy license, her willingness to sign a consent order, and her making restitution to Eckerd and CVS "re NJ fraudulent scripts charged and uncharged." CMS Ex. 7, at 2.[3]

The evidence thus shows that Petitioner illicitly supplied controlled substances to her boyfriend. I find that such conduct relates to the unlawful distribution or dispensing of controlled substances, and thus provides a basis for Petitioner's exclusion under section 1128(a)(4) of the Act.

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[3] Indeed, the Court documents alone would probably be sufficient to establish relatedness, since they show that Petitioner was a pharmacist, and that she was involved in a scheme to procure illegally controlled substances.

Petitioner also argues that she was, in part, motivated to engage in illegal conduct by her fear of her boyfriend. I find this irrelevant to the question of whether the I.G. has a basis for imposing an exclusion.

B. The statute mandates a five-year minimum period of exclusion, and mitigating factors may not be considered to reduce that period of exclusion.

An exclusion under section 1128(a)(4) must be for a minimum mandatory period of five years. As set forth in section 1128(c)(3)(B) of the Act:

> Subject to subparagraph (G), in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . . .

When the I.G. imposes an exclusion for the minimum mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2).

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded 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