

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Barbara Jean Emerson,	)	Date: January 14, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-632
	)	Decision No. CR1888
The Inspector General.	)	
_____	)	

**DECISION**

This matter is before me on the Inspector General’s (I.G.’s) Motion for Summary Affirmance of the I.G.’s determination to exclude Petitioner *pro se*, Barbara Jean Emerson, from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G. relies on the terms of section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). I grant the I.G.’s Motion for Summary Affirmance.

**I. Procedural Background**

Petitioner *pro se*, Barbara Jean Emerson, was a Licensed Practical Nurse in the State of Wyoming in 2007, when she became the subject of an investigation into the theft of certain prescription drugs from residents of a nursing home. On August 23, 2007, Petitioner was charged by criminal information filed in the Circuit Court for the Fifth Judicial District, State of Wyoming, with one count of Larceny by a Bailee, in violation of WYO. STAT. ANN. § 6-3-402(b), a misdemeanor.

Petitioner appeared with counsel in the Circuit Court on January 9, 2008, and pleaded guilty to the charge. She was sentenced on the same day to payment of a partially-suspended fine and certain costs, to payment of restitution to the Wyoming Medicaid program in the sum of \$84.35, and to a six-month period of supervised probation.

On May 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 July 11, 2008.

I convened a telephonic prehearing conference on August 21, 2008, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing them, and, by Order of August 21, 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 December 3, 2008. Petitioner has continued to act *pro se* throughout these proceedings.

The evidentiary record in this case is made up of the nine exhibits proffered by the I.G., I.G. Exhibits 1-9 (I.G. Exs. 1-9). Petitioner has not objected to these exhibits, nor has she proffered any exhibits of her own.

## **II. Issues**

The legal issues before me are set out at 42 C.F.R. § 1001.2007(a)(1). 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.

As I shall explain below, both issues must be resolved in favor of the I.G.'s position.

## **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.

WYO. STAT. ANN. § 6-3-402(b) provides:

(b) A bailee, a public servant as defined by W.S. 6-5-101(a)(vi) or any person entrusted with the control, care or custody of any money or other property who, with intent to steal or to deprive the owner of the property, converts the property to his own or another's use is guilty of larceny.

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 in 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 accepted plea of guilty on January 9, 2008, in the Circuit Court for the Fifth Judicial District, State of Wyoming, Petitioner Barbara Jean Emerson was found guilty of the criminal offense of Larceny by a Bailee, in violation of WYO. STAT. ANN. § 6-3-402(b). I.G. Ex. 9.
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. A nexus and a common-sense connection exist between the criminal offense to which Petitioner pleaded guilty and of which she was found guilty, as noted above in Finding 1, and the delivery of an item or service under a State health care program. I.G. Exs. 8, 9. *Berton Siegel, D.O.*, DAB No. 1467 (1994).

4. By reason of Petitioner's conviction, 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.

5. 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).

6. 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; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992). Those two essential elements are proven in the record before me.

Petitioner admits that she has been convicted, and the fact of her conviction is clear: I.G. Ex. 9 shows that on January 9, 2008, Petitioner appeared with counsel in the Court of Common Pleas and pleaded guilty to the misdemeanor crime of Larceny by a Bailee. The trial court's acceptance of that guilty plea and its finding of Petitioner's guilt appear in the Arraignment and Sentencing Order reflecting the proceedings, and are underscored by the fact that the trial court proceeded immediately to the imposition of sentence. I.G. Ex. 9. Those procedural steps satisfy the definitions of "conviction" set out at sections 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act. The I.G. has proven the first essential element.

It is true that the statute that Petitioner pleaded guilty to violating is not on its face specific to the Wyoming Medicaid program, and it is also true that the court records of Petitioner's conviction do not explicitly charge that the drugs she converted to her own use were intended for Medicaid beneficiaries. But the record in this case does include a report of the investigation that led to Petitioner's conviction. I.G. Ex. 8. I may properly consider this report — even though it is not part of the official court records — for I find that it is reliable and credible to show the underlying context of Petitioner's conviction: the contents and source of the report correspond in all particulars to the actual court records. *Narendra M. Patel, M.D.*, DAB No. 1736 (2000); *Tanya A. Chuoke, R.N.*, DAB

No. 1721 (2000); *Salmon Daniels*, DAB CR1380 (2005); *Neitra Maddox*, DAB CR1218 (2004). That report reflects the participation of the Wyoming Medicaid Fraud Control Unit in the investigation, and supplies the names and Medicaid numbers of the nursing home residents whose medications Petitioner converted to her own use. I.G. Ex. 8, at 1. I find that the report and the court records demonstrate the requisite nexus and common-sense connection between the criminal act and the program. *Berton Siegel, D.O.*, DAB No. 1467.

Moreover, the court records show that Petitioner was ordered to pay restitution in the amount of \$84.35 to “Wyoming Medicaid.” I.G. Ex. 9, at 1. 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, conclusive proof of the second essential element is found in I.G. Exs. 8 and 9.

Petitioner asks that I reduce the proposed period of exclusion, or modify it in some way as to make allowances for her successful completion of probation, and for her determined efforts to overcome a number of very difficult personal circumstances. I have no reason at all to doubt Petitioner’s assertions, and parts of the evidentiary record before me certainly suggest that for nearly a decade prior to the events in this case, Petitioner had gained control of her self-damaging criminal behavior. I.G. Ex. 8, at 2-4. But what Petitioner asks is beyond my power to grant. 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 brief and the documents she submitted to the I.G. prior to the I.G.’s final action. In doing so, 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 for any 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 particularly fitting 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 undisputed and unambiguous. They support summary disposition as a matter of settled law. This Decision issues accordingly.

## **VI. Conclusion**

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and is, GRANTED. The I.G.'s exclusion of Petitioner, Barbara Jean Emerson, 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