**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Hope May

Petitioner,

v.

The Inspector General.

Docket No. C-12-1106

Decision No. CR2689

Date: January 16, 2013

# DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner *pro se* Hope May 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 undisputed material facts in this case require the imposition of a five-year exclusion. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

## I. Procedural Background

On November 22, 2011, in the Circuit Court of the State of Oregon for Lane County, the Special Appointed Deputy District Attorney filed an Information charging Petitioner with two Class C felonies, Unlawfully Obtaining Public Assistance, in violation of OR. REV. STAT. § 411.630, and Unlawfully Using Supplemental Nutritional Assistance, in violation of OR. REV. STAT. § 411.840. Petitioner appeared with counsel in the Circuit Court and pleaded guilty to those charges on December 15, 2011, at which time the Circuit Court accepted Petitioner's guilty pleas, found her guilty on those pleas, and entered its judgment of conviction and sentence. Petitioner was placed on probation for

one year, was ordered to perform 100 hours of community service, and was required to pay restitution and costs in the total sum of $12,529.60. The Circuit Court further ordered that the two convictions be treated as misdemeanors, and not as the Class C felonies charged in the Information.

Section 1128(a)(1) of the Act mandates the exclusion of "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . any State health care program" for a period of not less than five years. On June 29, 2012, the I.G. notified Petitioner that she was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for a period of five years.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action on July 9, 2012.

I held a prehearing conference by telephone on September 5, 2012, pursuant to 42 C.F.R. § 1005.6, to discuss procedures for addressing the issues presented by this case. By Order of that date I established procedures and a schedule for the submission of documents and briefs. The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on January 3, 2013, in circumstances set out in my January 9, 2013 Order.

The evidentiary record on which I decide the issues before me contains five exhibits proffered by the I.G. marked I.G. Exhibits 1-5 (I.G. Exs. 1-5). Petitioner proffered nine exhibits (P. Exs. 1-9) with her Answer Brief, and proffered an additional six letters of reference with her Response Brief. I have marked those six letters P. Exs. 10-15. In the absence of objection, I have admitted all proffered exhibits, I.G. Exs. 1-5 and P. Exs. 1-15.

## II. Issues

The legal 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:

> a. 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

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

The controlling authorities require that these issues be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner's exclusion, for her predicate conviction has been established. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), and is therefore as a matter of law not unreasonable

## 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 convicted of a criminal offense related to the delivery of an item or service under title XVIII of the Act (the Medicare program) or any state health care program such as Medicaid. The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.101(a). Section 1128(a)(1) does not distinguish between felonies and misdemeanors as predicates for mandatory exclusion.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual or entity . . . 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 or entity . . . by a . . . State . . . court," section 1128(i)(2) of the Act; "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 first offender, deferred adjudication, or other arrangement or 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.

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. In a Judgment entered December 15, 2011 in the Circuit Court of the State of Oregon for Lane County, Petitioner *pro se* Hope May was found guilty, on her accepted pleas of guilty, of two misdemeanor criminal offenses to-wit: Unlawfully Obtaining Public Assistance, in violation of OR. REV. STAT. § 411.630, and Unlawfully Using

Supplemental Nutritional Assistance, in violation of OR. REV. STAT. § 411.840. P. Exs. 1, 9; I.G. Exs. 3, 4, 5.

2. The accepted pleas of guilty, findings of guilt, and Judgment described above constitute a "conviction" within the meaning of sections 1128(a)(1) and 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 offenses of which Petitioner was convicted, as noted above in Findings 1 and 2, and the delivery of an item or service under the Medicaid program. I.G. Ex. 2; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

4. Petitioner's conviction constitutes a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, pursuant to section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1).

5. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, it is as a matter of law 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 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)(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); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005); s*ee also Russell Mark Posner*, DAB No. 2033, at 5-6 (2006).

This record provides objective proof of both essential elements. Court records of Petitioner's conviction and its procedural history are before me as I.G. Exs. 3, 4, and 5, and P. Exs 1, 9. Those exhibits establish the first essential element. The relation of Petitioner's crime to the Medicaid program is elaborated by the investigator who developed the case against Petitioner in I.G. Ex. 2. In summary, Petitioner was at relevant times paid a monthly stipend as the adult foster care provider of food, care, and housing to her disabled brother under a state program funded by Medicaid. The investigation disclosed that she received the monthly stipend but did not provide the food stamps and housing as she was obliged to do by her Adult Foster Home Contract. Those facts establish the nexus or common-sense connection to the Medicaid program defined in *Berton Siegel, D.O.*, DAB No. 1467.

Once an individual's conviction is found to have been "related to the delivery of an item or service under Medicare or a State health care program," and thus to lie within the terms of section 1128(a)(1), the imposition of the five-year minimum exclusion established by section 1128(c)(3)(B) of the Act is mandatory and beyond the authority of the I.G. or an Administrative Law Judge (ALJ) to reduce, modify, or suspend. The Departmental Appeals Board (Board) has used unmistakable language to make this point: "Petitioner's exclusion was mandatory under the Act once the nexus was established between her offense and the delivery of an item or service under the Medicare program. The ALJ had no discretion to impose a lesser remedy." *Salvacion Lee, M.D.*, DAB No. 1850, at 4 (2002); *Lorna Fay Gardner*, DAB No. 1733, at 6 (2000); *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Napoleon S. Maminta, M.D.*, DAB No. 1135 (1990).

In contesting the proposed exclusion, Petitioner argues several variations on the single claim that she is innocent of the crimes she admitted in the Circuit Court. She complains that the criminal proceedings against her were flawed and reached an invalid result because of inaccurate, misunderstood, or disregarded evidence. Petitioner accuses her own attorney of improprieties that she now asserts deprived her of the chance to defend herself against charges of which she now stalwartly denies guilt. She also contends that she did not understand the consequences of her guilty pleas, but noticeably does not complain that the plea agreement reduced her crimes to misdemeanors instead of Class C felonies as charged. P. Ex. 1. The components of that claim all share this characteristic: they are all collateral attacks on her two guilty pleas and her resulting conviction, and the settled rule is that such collateral attacks on the validity of a conviction are simply

impermissible in this forum. I cannot look behind Petitioner's counseled, voluntary, and negotiated guilty pleas and the criminal conviction based on those two pleas. An apposite regulation and the well-settled law of this forum explicitly preclude such collateral attacks. 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380, at 8 (1993); *see also Donna Rogers*, DAB No. 2381 (2011); *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009). Those cases and the regulation govern this situation, and Petitioner's conviction is not open to collateral challenge in this forum now.

Petitioner asserts her desire to support her family by working, and states that "[i]f I am excluded, I am at risk of losing my job . . . ." P. Response Br. at 1. This record does not establish whether Petitioner is now employed in a protected health care program, but if it did, her argument would fail when confronted with the mandatory operation of the exclusion and the equally-mandatory minimum period for which it must be imposed. As the Board observed in *Joann Fletcher Cash*, DAB No. 1725, the precise point of the exclusion mechanism is to prevent untrustworthy individuals from involvement with protected health care programs. That this exclusion may have a limiting effect on an excluded individual's future employment is a natural and predictable consequence of any such exclusion, including this one. The substantial closing of certain occupations to Petitioner for five years and the probable loss of earnings from those occupations are no bar to the mandatory imposition of this exclusion. *Henry L. Gupton*, DAB No. 2058 (2007); *Salvacion Lee, M.D.*, DAB No. 1850.

Because the I.G. has established a basis for Petitioner's exclusion pursuant to section 1128(a)(1), the five-year period of her exclusion is also the mandatory minimum period allowed by section 1128(c)(3)(B) of the Act. 42 U.S.C. § 1320a-7(c)(3)(B). That period is reasonable as a matter of law.

I note once more that 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 Petitioner's submissions for any arguments or contentions that might raise a valid, relevant defense to the proposed exclusion and have found nothing that could be so construed. It is clear that Petitioner enjoys the high regard and trust of her family and friends. P. Exs. 10-15. But as I have pointed out above, the operation of this exclusion process based on section 1128(a)(1) is mandatory, and so is the mandatory minimum five-year period of exclusion.

Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). Resolution of a case by summary disposition is particularly fitting when settled law can be applied to

undisputed material facts. *Marvin L. Gibbs, Jr., M.D.,* DAB No. 2279; *Michael J. Rosen, M.D.,* DAB No. 2096. The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of law, and this Decision issues accordingly.

## VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition must be, and it is, GRANTED. The I.G.'s exclusion of Petitioner *pro se* Hope May 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 sustained.

/s/
Richard J. Smith
Administrative Law Judge