

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Kimberly Mazzeo,)	Date: April 27, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-06-631
)	Decision No. CR1591
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 the Petitioner *pro se* herein, Kimberly Mazzeo, 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)(4) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(4). The record before me reveals a proper basis for exclusion and for the imposition of the minimum five-year period of exclusion. Accordingly, I GRANT the I.G.'s Motion.

I. Procedural Background

In 2000, Kimberly Mazzeo, Petitioner *pro se*, was a registered nurse licensed to practice in the State of Florida. In September 2000, she twice violated FLA. STAT. § 893.13(7)(a)(9) by assuming a false name in a scheme to obtain the controlled substances hydrocodone and oxycodone. Felony charges were filed against her in two separate criminal proceedings in the Circuit Court for Osceola County, Florida. Appearing with counsel, she pleaded guilty to the first felony charge and was sentenced on November 2, 2000. Again appearing with counsel, she pleaded guilty to the second charge and was sentenced on January 5, 2001.

In the fullness of time, the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Section 1128(a)(4) of the Act dictates the mandatory exclusion, for a period of not less than five years, of “[a]ny individual or entity that has been convicted . . . under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.” Act, section 1128(c)(3)(B); 42 U.S.C. § 1320a-7(c)(3)(B). On June 30, 2006, fully five-and-one-half years after Petitioner’s second conviction, the I.G. notified Petitioner that she was to be excluded for the mandatory minimum period of five years.

Acting *pro se*, Petitioner timely sought review of the I.G.’s action in her letter of August 6, 2006. I held a prehearing conference by telephone on October 18, 2006, in order to discuss the issues in the case and procedures for addressing those issues. The parties agreed that the case could be decided on written submissions, and I established a schedule for filing documents and briefs. The results of that conference appear in the Order of October 20, 2006.

The I. G. timely filed a Motion for Summary Affirmance and a Brief in Support of the Motion on November 21, 2006. After being granted two extensions of time to do so, Petitioner *pro se* has filed no Answer Brief. Her only submission has been a group of four exhibits filed February 12, 2007.

The I.G. has neither filed a Reply Brief nor given notice that one would not be filed.

For purposes of 42 C.F.R. § 1005.20(c), the record in this case closed on March 6, 2007, the date by which Petitioner was required to file her Response Brief, or to give notice that she did not intend to do so, under the terms of the second extension of time granted her on January 12, 2007.

The I.G. proffered I.G. Exhibits 1-10 (I.G. Exs. 1-10), and, in the absence of objection, they are admitted. Petitioner’s four exhibits are incorrectly marked, but because they constitute her only answer to the I.G.’s Brief, I have simply remarked Petitioner’s four proffered exhibits as Petitioner’s Exhibits 1-4 (P. Exs. 1-4), and have admitted them as so designated.

II. Issues

The legal issues before me are strictly limited to those noted at 42 C.F.R. § 1001.2007(a)(1). In the context of this record 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)(4) of the Act; and
2. Whether the five-year period of the exclusion is unreasonable.

I must resolve both issues in favor of the I.G.'s position. The I.G. has a basis for Petitioner's exclusion pursuant to section 1128(a)(4) of the Act. The five-year period of exclusion is the minimum established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), and is therefore reasonable as a matter of law.

III. Controlling Statutes and Regulations

Section 1128(a)(4) of the Act, 42 U.S.C. § 1320a-7(a)(4), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "[a]ny individual or entity that has been convicted for an offense which occurred . . . [after August 21, 1996] . . . under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." The terms of section 1128(a)(4) are restated somewhat more broadly in regulatory language at 42 C.F.R. § 1001.101(d).

The Act defines "convicted" as including those circumstances: "(1) when a judgment of conviction has been entered against the individual . . . by a . . . State . . . court;" or "(2) when there has been a finding of guilt against the individual . . . by a . . . State . . . court;" or "(3) when a plea of guilty or nolo contendere by the individual . . . has been accepted by a . . . State . . . court . . ."; Act, section 1128(i)(1)-(3), 42 U.S.C. §§ 1320a-7(i)(1)-(3). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(4) is mandatory and the I.G. must impose it for a minimum period of five years. Act, section 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B).

IV. Findings and Conclusions

I find and conclude as follows:

1. Petitioner pleaded guilty to one felony charge of obtaining or attempting to obtain a controlled substance by fraud, in violation of FLA. STAT. § 893.13(7)(a)(9), in Cause No. CR00-2250, Circuit Court for Osceola County, Florida on November 2, 2000. She was adjudged guilty on that plea and sentenced the same day. I.G. Exs. 7, 8, 9.
2. Petitioner pleaded guilty to one felony charge of obtaining or attempting to obtain a controlled substance by fraud, in violation of FLA. STAT. § 893.13(7)(a)(9), in Cause No. CR00-2567, Circuit Court for Osceola County, Florida on January 5, 2001. She was adjudged guilty on that plea and sentenced the same day. I.G. Exs. 3, 4, 5.
3. The pleas, judgments, and sentences described above in Findings 1 and 2 each constitute a felony “conviction” within the meanings of sections 1128(a)(4) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.
4. By reason of the convictions described above in Findings 1, 2, and 3, Petitioner was subject to, and the I.G. was required to impose, a period of exclusion from participation in Medicare, Medicaid, and all other federal health care programs. Act, section 1128(a)(4).
5. The I.G. properly and reasonably set the period of Petitioner’s exclusion at five years, the mandatory minimum period provided by law. Act, section 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(b), 1001.2007(a)(2).
6. On May 31, 2006, 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)(4) of the Act. I. G. Ex. 10.
7. On August 6, 2006, Petitioner perfected her appeal from the I.G.’s action by filing a timely hearing request.
8. There are no disputed issues of material fact and summary affirmance is appropriate in this matter. *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)(4) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the criminal offense must have been a felony; (3) the felony conviction must have been for conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; and (4) the felonious conduct must have occurred after August 21, 1996. *Thomas Edward Musial*, DAB No. 1991 (2005); *Russell A. Johnson*, DAB CR1378 (2005); *Gerald A. Levitt, D.D.S.*, DAB CR1272 (2005); *Robert C. Richards*, DAB CR1235 (2004).

Petitioner has made no effort to deny the factual basis of the I.G.'s position. Her only claims here are those expressed explicitly in her hearing request and implicitly in her exhibits, and none of those expressions challenges the basis for the I.G.'s determination to exclude on the mandatory authority of section 1128(a)(4) of the Act. Thus, it is enough to state here simply that the accepted pleas, adjudications of guilt, and judgments of conviction supply all the essential elements in the I.G.'s case. I.G. Exs. 3, 4, 5, 7, 8, 9.

Against the fully-demonstrated presence of all four essential elements, Petitioner raises this defense in her hearing request:

The charges I received were from the year of 2000, which is almost 7 years ago. I have worked as a nurse since then, and I do not understand why this is coming up at this time.

Petitioner's Hearing Request at 1.

That may be a fair question. Part of an answer may lie in Petitioner's alleged repeated failures to complete rehabilitation programs and her alleged refusals to comply with her terms of probation, which alleged failures and refusals resulted in administrative action against her by the State of Florida's Department of Health on September 1, 2005. I.G. Ex. 1. But whether the I.G.'s inaction was the product of forbearance, inattention, or stratagem is irrelevant here. For better or worse, and in spite of its potential for making reason and conscience blush, the I.G.'s discretion as to when to impose an exclusion is unreviewable in this forum. *Thomas Edward Musial*, DAB No. 1991; *Samuel W. Chang, M.D.*, DAB No. 1198 (1990).

The balance of Petitioner's defense against the exclusion is found in the four documents submitted as P. Exs. 1-4. I repeat my observation that Petitioner has offered no written argument or statement in answer to the I.G.'s Brief she has placed before me only those four documents, and I am left to infer the tenor of her defense from them without guidance or suggestion. But their character is plain enough, each exhibit is a letter from a health-care professional attesting to Petitioner's good character and her successful participation in a drug-treatment program. One writer, whose letterhead describes her as a Licensed Mental Health Counselor and a Certified Hypnotherapist, offers it as her professional opinion that "[n]ot allowing Ms. Mazzeo to work in the health care field, would be like slitting her throat . . . it would be a crime" P. Ex. 2.

I have no reason to doubt Petitioner's rehabilitation, and no wish to minimize the testimonials of the authors of the four exhibits. But nothing in the four exhibits is sufficient to negate the mandatory application of section 1128(a)(4). She must be excluded from participation in Medicare, Medicaid, and all other federal health care programs. The five-year period of exclusion proposed in this case is the irreducible minimum required by section 1128(c)(3)(B) of the Act. *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002). As a matter of law it is not unreasonable. 42 C.F.R. § 1001.2007(a)(2).

Summary disposition in a case such as this is appropriate when there are no disputed issues of material fact and when clear and undisputed facts, not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum is guided by FED. R. CIV. P. 56 in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are clear, undisputed, and unambiguous. They support summary disposition 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 must be, and is, GRANTED. The I.G.'s exclusion of Petitioner Kimberly Mazzeo 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)(4) of the Act, is sustained.

/s/

Richard J. Smith
Administrative Law Judge