

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Janet A. DeHart,)	Date: September 13, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-403
)	Decision No. CR1649
The Inspector General.)	
_____)	

DECISION

This case is before me pursuant to a request for hearing filed by Janet A. DeHart, Petitioner, dated April 27, 2007, and received in the Civil Remedies Division on April 30, 2007.

BACKGROUND

By letter dated February 28, 2007, the Inspector General (I.G.) notified Petitioner, Janet A. DeHart, that she was being excluded from participation in the Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Social Security Act (Act) for the minimum period of five years. The I.G. informed Petitioner that her exclusion was imposed under section 1128(a)(3) of the Act, due to her conviction of a criminal offense (as defined in section 1128(i) of the Act) related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service or any act or omission in a health care program operated or financed by any Federal, State, or local agency.

On May 16, 2007, I convened a telephone prehearing conference during which Petitioner stated that her conviction did not fall within the exclusion provisions of the Act. The parties, therefore, agreed on a briefing schedule to address the sole issue of whether the I.G. is authorized to exclude Petitioner from participating in Medicare and other federally funded health care programs pursuant to 1128(a)(3) of the Act. Thus, I issued an order establishing briefing deadlines. Pursuant to that order, the I.G. filed a brief on June 19, 2007, accompanied by six proposed exhibits. These have been entered into the record as I.G. Exs. 1-6, without objection. Petitioner filed a brief on July 16, 2007, but proffered no exhibits. On August 1, 2007, the I.G. filed a reply brief.

It is my decision to sustain the determination of the I.G. to exclude Petitioner from participating in the Medicare, Medicaid, and all federal health care programs, for a period of five years. I base my decision on the documentary evidence, the applicable law and regulations, and the arguments of the parties. It is my finding that Petitioner was convicted of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. Additionally, I find that where the exclusion is for the five-year minimum period, no question of reasonableness as to the length of such exclusion exists.

ISSUE

The issue in this case 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 as defined in section 1128B(f) of the Act.

APPLICABLE LAW AND REGULATIONS

Section 1128(a)(3) of the Act authorizes the Secretary of Health and Human Services (Secretary) to exclude from participation in any federal health care program (as defined in section 1128B(f) of the Act), any individual convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service.

An exclusion under section 1128(a)(3) of the Act must be for a minimum period of five years. Section 1128(c)(3)(B) of the Act. Aggravating factors can serve as a basis for lengthening the period of exclusion. 42 C.F.R. § 1001.102(b). If aggravating factors justify an exclusion longer than five years, mitigating factors may be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

Pursuant to 42 C.F.R. § 1001.2007, an individual or entity excluded under section 1128(a)(3) of the Act may file a request for a hearing before an administrative law judge.

FINDINGS AND DISCUSSION

The findings of fact and conclusions of law noted below, in bold face, are followed by a discussion of each finding.

1. Petitioner's conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service justifies her exclusion by the I.G. from participation in the Medicare, Medicaid, and all other federal health care programs.

Petitioner is a pharmacist that was licensed by the State of Ohio. Her license to practice pharmacy was summarily suspended effective August 17, 2005. I.G. Ex. 3, at 2.

On October 28, 2005, the Grand Jury of Montgomery County, State of Ohio, returned a two count indictment for theft of dangerous drugs, against Petitioner, Janet A. DeHart, for stealing Butalbital and Floricat from Walgreens pharmacy. I.G. Ex. 4. Petitioner engaged in theft of Walgreens drugs while employed as a pharmacist by that pharmacy chain. I.G. Ex. 3, at 2.

On January 18, 2006, the Court of Common Pleas entered a decision and Order of Intervention in Lieu of Conviction against Petitioner. I.G. Ex. 2.

Petitioner contends that she was not convicted of an offense that has a "nexus" or "common sense connection" with the delivery of an item or service under a covered Medicare or Medicaid program. Petitioner's brief at 2. This argument is without merit.

Section 1128(a)(3) of the Act provides, in relevant part -

(a) The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

* * *

(3) FELONY CONVICTION RELATED TO HEALTH CARE FRAUD - Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program . . . operated by or financed in whole or part by any Federal, State or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

To prevail, the I.G. must show that:

- Petitioner was convicted of a felony for an offense that occurred after the enactment of the Health Insurance Portability and Accountability Act (HIPAA) of 1996,¹ relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct and,
- that the conviction was in connection with the delivery of a health care item or service; **or**,
- that the conviction was with respect to any act or omission in a health care program . . . operated by or financed in whole or part by any Federal, State or local government agency.

Petitioner does not dispute that she has been convicted of a felony; i.e., theft of dangerous drugs. Thus, the I.G. has clearly established the first part of the two pronged requirement. *The statute does not require* that the conviction consist of an act of fraud, theft, embezzlement, or breach of fiduciary responsibility *and* that the conviction be related to the delivery of an item or service under a covered Medicare or Medicaid program.

¹ No issue exists as to Petitioner's conviction having taken place after the enactment of HIPAA 1996.

Consequently, the I.G. need not demonstrate that the conviction was with respect to any act or omission in a health care program . . . operated by or financed in whole or part by any Federal, State or local government agency.

The I.G. has also established the second part of the two pronged requirement by showing that Petitioner's conviction was in connection with the delivery of a health care item or service. It is unquestionable that the theft of drugs by a pharmacist, from her employing pharmacy, is related to the delivery of a health care item or service.²

In view of the foregoing, I find that the I.G. properly excluded Petitioner under section 1128(a)(3) of the Act. The I.G. has established that Petitioner was convicted of a felony offense involving fraud or other financial misconduct in connection with the delivery of a health care item or service, occurring after the date of enactment of HIPAA.

2. Petitioner's exclusion for a period of five years is not unreasonable.

An exclusion under section 1128(a)(3) of the Act 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 mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2). Aggravating factors that justify lengthening the exclusion period may be taken into account, but the five-year term will not be shortened. Petitioner was convicted of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. As a result of Petitioner's conviction, the I.G. was required to exclude her pursuant to section 1128(a)(3) of the Act, for at least five years.

² *Tanya A. Chouke*, R.N., DAB CR865 (2002), and others, cited by Petitioner at the bottom of page 3 of her brief in support of the contention that the delivery of a Medicare/Medicaid item or service must be an element in the chain of events giving rise to the offense are related to exclusions under Section 1128(a)(1) of the Act, and thus, inapplicable here.

