Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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| In the Case of: | ) | |
| | ) | |
| Marilyn June McCullough, a/k/a, | ) | |
| Marilyn June Knight, | ) | Date: December 10, 2009 |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| - v. - | ) | Docket No. C-09-587 |
| | ) | Decision No. CR2042 |
| The Inspector General. | ) | |
| | ) | |

## DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition that, if granted, would affirm the I.G.'s determination to exclude Petitioner *pro se* Marilyn June McCullough, a.k.a. Marilyn June Knight, 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 facts in this case mandate the five-year exclusion, and for that reason I grant the I.G.'s Motion for Summary Disposition.

### I. Procedural Background

Petitioner *pro se* Mary June McCullough was licensed to practice nursing in the State of Kansas and employed as a nurse at Medicalodges, a skilled nursing facility, located in Eureka, Kansas, in 2006. On or about May 1, 2006, Petitioner stole 15 Lortabs/Hydrocodone tablets, Schedule III controlled substances intended for a Medicaid beneficiary residing in the nursing facility.

As a result of Petitioner's theft of the drugs intended for a Medicaid beneficiary, a criminal complaint/information was filed, on May 16, 2006, in the District Court of Greenwood County, Kansas, charging Petitioner with one count of Theft, in violation of KAN. STAT. ANN. § 21-3701(a)(1) and (a)(2), one count of Possession of Narcotic Drugs, in violation of KAN. STAT. ANN. § 65-4160, and seventeen counts of Giving a Worthless Check, in violation of KAN. STAT. ANN. § 21-3707. On June 30, 2006, Petitioner pleaded guilty to the Theft charge and two counts of Giving a Worthless Check. The

District Court of Greenwood County, Kansas accepted Petitioner's guilt pleas, entered a judgment of conviction and sentenced Petitioner to 12 months probation, along with 20 hours of community service, and required Petitioner to pay court costs, fees and to make restitution.

On May 29, 2009, the I.G. notified Petitioner that she was to be excluded from participation in Medicare, Medicaid and all Federal health care programs pursuant to the terms of section 1128(a)(1) of the Act for the mandatory minimum period of five years. Petitioner timely sought review of the I.G.'s action by her *pro se* letter dated July 1, 2009.

I convened a telephonic prehearing conference on August 10, 2009, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures for addressing the case. By Order of August 11, 2009, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case is closed under the circumstances set out in my Order of August 11, 2009.

The evidentiary record on which I decide the issues before me contains seven exhibits proffered by the I.G. and marked I.G. Exhibits 1-7 (I.G. Exs. 1-7). Petitioner proffered three unmarked exhibits of her own. I have marked a September 4, 2009 letter from the Kansas Nurse Assistance Program as Petitioner's Exhibit (P. Ex.) 1. I have marked a March 24, 2009 Order Terminating Probation Successfully Completed as P. Ex. 2. Petitioner's third exhibit is identical to I.G. Ex. 7 and therefore not received into evidence. In the absence of objection, I admit I.G. Exs. 1-7 and P. Exs. 1-2.

## II. Issues

The 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:

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.

Both issues must be resolved in favor of the I.G.'s position. Because her predicate conviction has been established, section 1128(a)(1) of the Act mandates Petitioner's exclusion. A five-year period of exclusion is reasonable as a matter of law, since it is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B).

## III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the mandatory 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.

A "conviction" is defined under section 1128(i) of the Act to include: (1) when a judgment of conviction has been entered against an individual by a federal, state, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged; (2) when there has been a finding of guilt against the individual by a federal, state or local court; (3) when a plea of guilty or nolo contendere by the individual has been accepted by a federal, state, or local court; or (4) when the individual has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been with-held. 42 U.S.C. § 1320a-7(i)(1)-(4). 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 guilty pleas of June 30, 2006, in the District Court of Greenwood County, Kansas, Petitioner Marilyn June McCullough was found guilty of one count of the criminal offense of Theft, in violation of KAN. STAT. ANN. § 21-3701(a)(1), and two counts of the criminal offense of Giving a Worthless Check, in violation of KAN. STAT. ANN. § 21-3707. I.G. Exs. 4, 6, 7.

2. The guilty plea, the finding of guilt, and the judgment of conviction as to Petitioner's violation of KAN. STAT. ANN. § 21-3701(a)(1) 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 Petitioner's conviction, as noted above in Findings 1 and 2 above, and the delivery of an item or service under a State health care program. I.G. Exs. 4, 5, 6, 7. *Berton Siegel, D.O.*, DAB No. 1467 (1994).

4. By reason of Petitioner's conviction, a basis exists for the I.G.'s determination to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, pursuant to section 1128(a)(1) of the Act.

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 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). These two essential elements are fully established in the record before me.

The first essential element is conclusively established by the District Court records, which include the Greenwood County Sheriff's Office Incident Narrative (I.G. Ex. 4), a March 3, 2009 letter from the President and CEO of Medicalodges, Inc. (I.G. Ex. 5), the May 16, 2006 Complaint/Information filed in the District Court of Greenwood County (I.G. Ex. 6), and the District Court's Journal Entry of Plea and Sentencing (I.G. Ex. 7). Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; or when there has been a finding of guilt in a federal, state, or local court; or when a plea of guilty or no contest has been accepted in a federal, state, or local court; or when an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Petitioner was clearly convicted within the meaning of section 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act when her guilty pleas were accepted by the District Court. The I.G. has proved the first essential element.

The second essential element ― the nexus or common-sense connection to the delivery of an item or service under a protected health care program, for section 1128(a)(1) applies only in the context of a protected program ― is present when a caregiver or administrator, acting in a setting where care is being provided by that person or under that person's supervision, steals from the person or persons being cared for who are either Medicare or Medicaid beneficiaries. *Catherine R. Kinnunen*, DAB CR1889 (2009); see also *Kim Anita Fifer*, DAB CR1016 (2003). It is true that the statute that Petitioner pleaded guilty to violating is not on its face specific to the Kansas Medicaid program, and it is also true that the court records of Petitioner's conviction do not explicitly charge that the drugs she stole were intended for Medicaid beneficiaries. But the record in this case does include a report of the investigation conducted by the Greenwood County Sheriff's Office (I.G. Ex. 4) that led to Petitioner's conviction. That report reflects that along with the missing narcotic medication, one of the medication record sheets was missing. The medication record sheet was later discovered shredded into strips. When put together the strips showed that the medication record sheet was for a resident that was a Medicaid beneficiary. I.G. Exs. 4, 5. In addition, the I.G. has submitted a letter from the President and CEO of Medicalodges, Inc. that states that the resident whose Schedule III medication was stolen was a Medicaid beneficiary. I.G. Ex. 5. I may properly consider these exhibits ― even though they are not part of the official court records ― for I find that that these exhibits are reliable and credible to show the underlying context of Petitioner's conviction: *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). I find that the report, the letter from Medicalodges, Inc., 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.

The record thus shows that on or about May 1, 2006, the staff at Medicalodge noted discrepancies in the count of Hydrocodone doses. Hydrocodone is a Schedule III controlled substance and is regarded as a narcotic drug by KAN. STAT. ANN. § 65-4101 *et seq*. This drug was intended for use by a resident in Medicalodge who was a Medicaid beneficiary. I.G. Exs. 4, 5. Medicalodge reported the missing Hydrocodone to the Greenwood County Sheriff's Office. Pursuant to execution of a search warrant of Petitioner's home, the missing Hydrocodone was located resulting in Petitioner being charged with Theft in the District Court of Greenwood County. I.G. Ex. 3, 4, 5, 6, 7. There is ample support for my finding that the required nexus or common-sense connection exists when private property is converted by criminal means or stolen from Medicare or Medicaid beneficiaries. *Andrew L. Branch*, DAB CR1359 (2005); *Tenisha Taylor, a/k/a Tenisha Carter*, DAB CR1132 (2004); *Dorothy A. Woodrum*, DAB CR956 (2002); *Roberta E. Miller*, DAB CR367 (1995); *Teri L. Gregory*, DAB CR336 (1994); *Gary Gregory*, DAB CR274 (1993); *Jerry L. Edmonson*, DAB CR59 (1989). The I.G. has proved the second essential element.

It should be noted here, however, that I base no part of this Decision or the analysis on which it is based on Petitioner's convictions for violating KAN. STAT. ANN. § 21-3707: The two counts of Giving a Worthless Check do not appear to have occurred in a context where a connection or nexus to a protected program has been suggested.

Petitioner admits her crime. Pet. Answer Brief, at 1. Petitioner's *pro se* defense to the proposed exclusion is that she has taken responsibility for her crime, made restitution, has worked since her conviction without any blemish to her work record, completed the probation period and the Kansas Nurse Assistance Program successfully. Further, Petitioner argues that a five-year exclusion is too long — and thus, presumably, unreasonable — since her conviction was on a misdemeanor theft charge. She also argues that the period of exclusion should have been calculated from the date of her conviction, or from the date of the incident itself, and not from the date of the I.G.'s notice letter. Pet. Answer Brief, at 1.

Petitioner's argument that she was convicted merely of a misdemeanor is unavailing. The Act and the regulations make no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion. 42 C.F.R. § 1001.101(a).

I have no authority to alter the effective date of the exclusion. As another Administrative Law Judge (ALJ) of this forum has trenchantly observed: "It is well-settled that an [ALJ] is without authority to change the effective date of an exclusion, *no matter how inexplicable or unfair the delay*." *Jeffrey N. Fadel, M.Dl*, DAB CR1925 (2009) (emphasis added). Although the jurisprudence of this forum provides examples of such unfair or inexplicable delays in abundance, the Departmental Appeals Board (Board) has resolutely held to its doctrine that the applicable statute and regulations give an Administrative Law Judge (ALJ) no authority to adjust the beginning date of an exclusion period by applying it retroactively. *Lisa Alice Gantt*, DAB No. 2065 (2007);*Thomas Edward Musial*, DAB No. 1991,at 4-5 (2005), citing *Douglas Schram, R.Ph.*, DAB No. 1372, at 11(1992) ("Neither the ALJ nor this Board may change the beginning date of Petitioner's exclusion."); *David D. DeFries*, DAB No.1317, at 6 (1992) ("The ALJ cannot . . . decide when [the exclusion] is to begin."); *Richard D. Phillips*, DAB No. 1279(1991) (An ALJ does not have "discretion . . . to adjust the effective date of an exclusion, which is set by regulation."); *Samuel W. Chang*, M.D., DAB No. 1198, at 10 (1990) ("The ALJ has no power to change . . . [an exclusion's] beginning date."). Moreover, a delay between the conviction date on which the exclusion is based and the I.G.'s notice letter of exclusion does not render the exclusion invalid. *Lisa Alice Gantt*, DAB No. 2065.

Nor can I consider Petitioner's other assertions and change the length of Petitioner's period of exclusion. Once an individual has been convicted of a criminal offense within the meaning of section 1128(a)(1), exclusion from participation in Medicare, Medicaid,

and all federal health care programs for a minimum period of five years is mandatory and cannot be shortened. Act, section 1128(c)(3)(B).

Because Petitioner appears here *pro se*, I have taken additional care in reading her brief and her request for hearing, 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 appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *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, clear, and unambiguous. They support summary disposition as a matter of law, and this Decision is issued accordingly.

## VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Marilyn June McCullough a.k.a. Marilyn June Knight 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