

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Arlene Gibbs,

Petitioner

v.

The Inspector General.

Docket No. C-11-453

Decision No. CR2450

Date: October 12, 2011

DECISION

This matter is before me in review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Arlene Gibbs from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s determination to exclude Petitioner is based on the terms of section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). The facts of this case mandate the imposition of a five-year exclusion, and so I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner was employed as a certified medication assistant in the assisted living facility section of Fellowship Village, a continuing care retirement community, located in Bernards Township, New Jersey. As part of her job, Petitioner was provided access to the living quarters of the residents, many of whom retained checkbooks for their personal bank accounts in their quarters. Beginning in or about July 2002 and continuing until about December 2002 Petitioner and three co-defendants conspired to and did steal from residents of the facility and defraud a number of banks. Specifically, Petitioner stole blank checks from residents of the assisted living facility where she worked. She and

three co-conspirators then forged the residents' signatures and deposited the fraudulent checks into various bank accounts. Petitioner and her co-conspirators fraudulently negotiated or attempted to negotiate approximately \$98,575 in checks that Petitioner stole from Fellowship Village residents.

On September 22, 2003, the Federal Grand Jury in and for the United States District Court for the District of New Jersey handed up an Indictment charging Petitioner and three others with six criminal counts. On October 23, 2003, Petitioner appeared with counsel in the United States District Court and pleaded guilty to Conspiracy to Commit Bank Fraud and Bank Fraud, in violation of 18 U.S.C. §§ 2, 371, and 1344. She was sentenced on August 5, 2004, to a six-month term of house arrest, was assessed \$200, and was ordered to pay restitution to the banks in the sum of \$25,703.15.

As required by the terms of section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. On April 30, 2007, the I.G. issued Petitioner notice that she was being excluded pursuant to the terms of section 1128(a)(3) of the Act for the mandatory minimum period of five years. The notice stated that the exclusion was effective beginning May 20, 2007. Therefore, Petitioner's exclusion is scheduled to expire on May 20, 2012.¹

Acting *pro se*, Petitioner sought review of the I.G.'s action by letter dated May 6, 2011 and mailed May 9, 2011, pursuant to 42 C.F.R. § 1005.2. Although the date of Petitioner's letter raises the issue of its timeliness within the limits set out at 42 C.F.R. § 1005.2(c), the I.G. determined not to raise the issue of timeliness. I convened a telephonic prehearing conference on June 9, 2011, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing those issues. By Order of June 10, 2011, I established a schedule for the submission of documents and briefs.

On July 11, 2011, the I.G. filed its Motion for Summary Disposition. Petitioner submitted an Answer Brief (P. Ans. Br.) in letter form received in this office on August 10, 2011. On August 31, 2011, the I.G. filed its Reply and on September 19, 2011 Petitioner filed her Response Brief. There are six exhibits in this case. The I.G. proffered three exhibits marked I.G. Exhibits 1 through 3 (I.G. Exs. 1-3), and Petitioner proffered three exhibits which I have marked Petitioner's Exhibits 1 through 3 (P. Exs. 1-3). All proffered exhibits are admitted without objection. Briefing is now complete, and the record in this case closed on September 19, 2011.

¹ I remind Petitioner, however, that once her exclusion expires her reinstatement is not automatic. She will not be reinstated at the conclusion of her exclusion unless she applies to the I.G. and is granted reinstatement. *See* I.G. Ex. 1, at 3.

II. Issues

The issues before me are limited to those listed at 42 C.F.R. § 1001.2007(a)(1). In the specific 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)(3) of the Act; and
2. Whether the length of the proposed 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, there is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act. A five-year term 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 not unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), 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, 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 (other than those specifically described in [section 1128(a)](1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." The terms of section 1128(a)(3) are restated in similar language at 42 C.F.R. § 1001.101(c).

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

An exclusion based on section 1128(a)(3) is mandatory and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B); 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

Based on the undisputed material facts in the record before me, I find and conclude as follows:

1. On her accepted pleas of guilty on October 23, 2003, in the United States District Court for the District of New Jersey, Petitioner Arlene Gibbs was found guilty of one count of Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. § 371, and one count of Bank Fraud, in violation of 18 U.S.C. §§ 1344 and 2. I.G. Ex. 3.
2. Final judgment of conviction was entered against Petitioner and she was sentenced on her guilty pleas in the United States District Court for the District of New Jersey on August 4, 2004. I.G. Ex. 3.
3. Petitioner's convictions described above in Findings 1 and 2 constitute convictions of felonies. 18 U.S.C. § 3559(a)(2); I.G. Ex. 3.
4. The judgment of conviction, finding of guilt, and accepted pleas of guilty described above in Findings 1, 2, and 3 constitute a "conviction" within the meaning of sections 1128(a)(3) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.
5. There is a nexus and a common-sense relationship between the felony offenses of which Petitioner was convicted, as noted above in Findings 1, 2, and 3 above, and fraud in connection with the delivery of a health care item or service. I.G. Exs. 2, 3.
6. Petitioner's convictions as noted above in Findings 1, 2, 3, and 4 constitute a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Act § 1128(a)(3); 42 U.S.C. § 1320a-7(a)(3).
7. The five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, and is therefore not unreasonable. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).
8. There are no disputed issues of material fact and summary disposition is therefore 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

Petitioner first asserts that the I.G.'s exclusion is not valid because the I.G. failed to send its April 30, 2007 notice of exclusion to her proper address. The I.G. acknowledged that it posted the notice to an incorrect address and therefore determined not to raise the issue of timeliness. Petitioner acknowledges that she subsequently received a copy of the I.G.'s notice.² Petitioner's appeal rights have not been hindered by her delayed receipt of the I.G.'s notice nor has it impaired Petitioner's opportunity to present her case before me.

The four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, *or* the felony offense must have been with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the felonious conduct must have occurred after August 21, 1996. *Andrew D. Goddard*, DAB No. 2032 (2006); *Kenneth M. Behr*, DAB No. 1997 (2005); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Jeremy Robinson*, DAB No. 1905 (2004); *Breton Lee Morgan, M.D.*, DAB CR1913 (2009); *Morganna Elizabeth Allen*, DAB CR1479 (2006); *Theresa A. Bass*, DAB CR1397 (2006); *Michael Patrick Fryman*, DAB CR1261 (2004); *Golden G. Higgwe, D.P.M.*, DAB CR1229 (2004); *Thomas A. Oswald, R.Ph.*, DAB CR1216 (2004); *Katherine Marie Nielsen*, DAB CR1181 (2004).

Petitioner does not deny that she was convicted of felony offenses, that her conduct occurred after August 21, 1996, or that her criminal activity occurred while she was working in a health care facility. Hearing Request (H.R.) at 1; P. Br. at 2. She does not explicitly dispute the relation of the conduct underlying her convictions to fraud or theft. There appears to be no challenge to the I.G.'s proof of any of the essential elements set out above.

In this case, it is uncontested that Petitioner's felony offenses of bank fraud and conspiracy were based on conduct related to fraud, theft, breach of fiduciary responsibility and other financial misconduct. Petitioner's employer, Fellowship Village, was and is a continuing care retirement community providing skilled nursing and assisted living facility services. I.G. Ex. 2; H.R. Petitioner and three others formed a plan to steal checks from Fellowship Village residents, to fraudulently write the checks, forge the

² I further note that on May 31, 2011, this office provided Petitioner a copy of the exclusion notice.

signatures of the Fellowship Village residents on the checks, and then negotiate the fraudulent and forged checks at various banks. I.G. Ex. 2, at 1-3.

It was a necessary part of the plan that Petitioner used her official position with Fellowship Village to obtain access to the residents' living quarters, where Petitioner alone then stole personal checks from a number of the residents. I.G. Ex. 2. One or more members of the conspiracy, including Petitioner, then forged the signatures of the victim Fellowship Village residents on the checks and made them payable to certain designees. The checks ranged in amounts from \$2,000 to \$48,525. I.G. Ex. 2, at 3. Petitioner's co-conspirators then caused various individuals to deposit the stolen, forged and unauthorized checks into the personal bank accounts of others and then withdrew or attempted to withdraw the proceeds from those checks. I.G. Ex. 2, at 4. Before authorities discovered and stopped the conspiracy and felonious acts, Petitioner and her co-conspirators fraudulently negotiated or attempted to negotiate approximately \$98,575 in checks that Petitioner stole from the Fellowship Village residents. I.G. Ex. 2, at 4.

Petitioner was convicted of Conspiracy to Commit Bank Fraud and Bank Fraud, Class B felonies. 18 U.S.C. § 3559(a)(2); I.G. Ex. 3. It is evident that Petitioner's felonious conduct was not only related to fraud: it is a purely *crimen falsi* offense, and the obvious product of an organized, sustained, and carefully-planned criminal enterprise rooted in deception and betrayal. I.G. Ex. 3; *see* 18 U.S.C. § 371.

There is an obvious "common sense connection" between Petitioner's criminal activity and the delivery of health care services at Fellowship Village. Petitioner's employment and therefore her access as a care provider were essential to the conspiracy's very existence. As a certified medication assistant, Petitioner was placed in a position of trust, to aid in the care of vulnerable residents. Petitioner used her position to steal blank checks from the residents which were then fraudulently written, signed, and presented for deposit at a number of financial institutions. Petitioner conspired to and in fact did use her position of trust to exploit, betray, and victimize the very individuals that she was tasked to care for. On these facts, the nexus between Petitioner's crime and health care is flagrant.

I find that the I.G. has proven the essential elements none of which are disputed.

Petitioner argues that she should not be excluded under the mandatory provision of 1128(a) of the Act. P. Br. at 1. The Act expressly provides for mandatory five-year minimum periods of exclusion *whenever* an individual has been convicted of a felony related to health care fraud. Act § 1128(a)(3). Neither the I.G. nor I have been granted the discretion or authority to reduce the exclusion period below the statutory minimum once the I.G. has established the required elements of a mandatory exclusion. If the mandatory 1128(a) exclusion terms fit, as they do in this case, then the I.G. has no discretion to invoke the permissive 1128(b) exclusion. *Craig Richard Wilder*, DAB No.

2416, at 7 (2011); *Tanya A. Chuoke*, DAB No. 1721, at 14 (2000); *Lorna Fay Gardner*, DAB No. 1733, at 6 (2000).

Petitioner requests that the I.G. not impose the exclusion. Petitioner states: "I accepted responsibility for my actions and suffered emotionally and financially because no employer would hire me because I have a felony." "During my hardship I was forced to get on Welfare to put food on the table for my 2 boys" After obtaining employment her son was diagnosed with cancer, so she "ask[ed her] employer to lay [her] off so [she] could be with her child." H.R. After two years at home, Petitioner obtained employment as a driver for a facility that received federal funding. After three months, her employer discovered that Petitioner was excluded from participating in the program, and therefore terminated her employment. H.R. Petitioner submits bills or collection notices as evidence of her financial hardship. P. Ex. 1-3.

I am unable, however, to consider Petitioner's arguments. The five-year period of exclusion proposed in this case is the minimum required by section 1128(c)(3)(B) of the Act. As a matter of law it is not unreasonable, and neither the Board nor I can reduce it. 42 C.F.R. § 1001.2007(a)(2); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

I note once more that Petitioner appears here *pro se*. Because of that 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 all of Petitioner's pleadings for any arguments or contentions that might raise a valid, relevant defense to the I.G.'s Motion, but 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. The Decision issues accordingly.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Arlene Gibbs 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)(3) of the Act, is sustained.

/s/

Richard J. Smith
Administrative Law Judge