Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Marietje Kindangen,	)	Date: April 7, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-674
	)	Decision No. CR1765
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, Marietje Kindangen, 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)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). Because the facts in this case mandate the imposition of a five-year exclusion, I grant the I.G.'s Motion for Summary Affirmance.

I. Procedural Background

During the summer of 2005, Petitioner Marietje Kindangen was employed as a caregiver at First Step Highland-MENTOR (FSH-M), an adult day-care facility for developmentally-disabled persons located in San Bernardino, California. FSH-M participates in the state Medicaid program known in California as Medi-Cal, and the services FSH-M provides to its clients and residents are billed to and paid by Medi-Cal.

On November 9, 2006, Petitioner appeared with her counsel, the deputy public defender, and with an official court interpreter in the Superior Court of California, County of San Bernardino. Having negotiated a plea bargain, Petitioner pleaded *nolo contendere* to the misdemeanor offense of Elder or Dependent Adult Abuse, in violation of CAL. PENAL CODE § 368(c). The named victim of Petitioner's abuse was a Medi-Cal beneficiary and client of FSH-M, and part of the charge asserted that Petitioner at the time of the abuse

had "the care and custody of said victim." Petitioner was sentenced on the same day to a two-year term of probation, and was fined $130. On her motion, Petitioner's term of probation was terminated early, on February 6, 2008.

As required by 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 June 29, 2007, the I.G. notified Petitioner that she was to be excluded pursuant to the terms of section 1128(a)(2) 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 31, 2007. I convened a telephonic prehearing conference on October 17, 2007, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing those issues. Prior to the conference it had become apparent that Petitioner's language skills in English are somewhat limited, and she was assisted during the conference by her niece, Caroll Makalew. I suggested that the case likely could be decided on written pleadings, and by Order of October 19, 2007, I established a schedule for the submission of documents and briefs.

That schedule has been repeatedly modified. The first modification was at the request of the I.G., who on Motion of November 9, 2007, and by my Orders of November 13, 2007 and December 12, 2007 was permitted to amend the basis of the proposed exclusion from section 1128(a)(2) of the Act to section 1128(a)(1). Several subsequent amendments of the briefing schedule, based on my Orders of January 30, 2008, February 25, 2008, and March 3, 2008, have been made necessary by filings or communications received from Petitioner or Ms. Makalew, who has continued to assist Petitioner.

All briefing is now complete, and the record in this case closed on March 20, 2008.

The evidentiary record on which I decide the issues before me comprises 21 exhibits. The I.G. proffered 20 exhibits marked I.G. Exhibits 1-20 (I.G. Exs. 1-20). In the interest of clarity I point out that these exhibits do not include the eight marked exhibits attached to the I.G.'s November 9, 2007 Motion. Petitioner proffered two exhibits marked Petitioner's Exhibits 1-2 (P. Exs. 1-2). In the absence of objection, all proffered exhibits are admitted as designated in this paragraph, except for I.G. Ex. 20.

Because it is irrelevant to any of the issues before me, and because its submission with the I.G.'s Reply Brief was not authorized, I.G. Ex. 20 is not admitted to the evidentiary record on which I decide these issues.

II. Issues

The issues before me are set out at 42 C.F.R. § 1001.2007(a)(1). 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.

The I.G.'s position on both issues is correct. 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 reasonable as a matter of law, for 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 for a minimum of five years 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." Title XIX of the Act is the state Medicaid program, known in California as Medi-Cal. 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.

In California, the offense of Elder or Dependent Adult Abuse is defined at CAL. PENAL CODE § 368(c), which provides:

> Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured or willfully

> causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health may be endangered, is guilty of a misdemeanor.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . 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 . . . 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 . . . deferred adjudication . . . 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. On her plea of *nolo contendere* on November 9, 2006, in the Superior Court of California, County of San Bernardino, Petitioner Marietje Kindangen was found guilty of the misdemeanor offense of Elder or Dependent Adult Abuse, in violation of CAL. PENAL CODE § 368(c). I.G. Exs. 5, 6, 18, 19; P. Ex. 1.

2. Petitioner was sentenced on her plea in the Superior Court on November 9, 2006. I.G. Exs. 6, 18, 19; P. Ex. 1.

3. The accepted plea of *nolo contendere*, finding of guilt, and sentence described above constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(2) and (3) of the Act, and 42 C.F.R. § 1001.2.

4. A nexus and a common-sense connection exist between the criminal offense to which Petitioner pleaded *nolo contendere* and of which she was convicted, as noted above in Findings 1, 2 and 3, and the delivery of an item or service under Med-Cal, the California state health care program. I.G. Exs. 5, 6, 7, 8, 14, 15, 16, 17; *Berton Siegel, D.O.,* DAB No. 1467 (1994).

5. On June 29, 2007, 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)(2) of the Act. I.G. Ex. 3.

6. Acting *pro se*, Petitioner perfected her appeal from the I.G.'s action by filing a timely hearing request on July 31, 2007.

7. On Motion and pursuant to my Order of December 12, 2007, the I.G. was permitted to amend the basis for Petitioner's proposed exclusion: that amendment provided 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)(1) of the Act. I.G. Ex. 1.

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

9. By reason of her conviction, Petitioner was subject to, and the I.G. was required to impose, the mandatory minimum five-year period of exclusion from Medicare, Medicaid, and all other federal health care programs. Section 1128(c)(3)(B) of the Act; 42 C.F.R.
§ 1001.102(a).

10. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, it is therefore not unreasonable. Section 1128(c)(3)(B) of the Act; 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

11. 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

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. *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Mark D. Perrault, M.D.*, DAB CR1471 (2006); *Andrew L. Branch*, DAB CR1359 (2005); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005).

Those two essential elements are patent in this record, but in so noting I observe that although Petitioner has not directly challenged the I.G.'s proof of those two elements, her efforts in this appeal have been *pro se* in fact if not strictly so in name, and she has sometimes not responded directly to the I.G's arguments. She has instead advanced other arguments, not always with the clarity, organization, or precision that stronger legal or language skills might produce. Thus, in looking first at the I.G.'s proof of those elements, and then at Petitioner's own arguments against her exclusion, I have reminded myself that she and her arguments are entitled to an "extra measure of consideration" in their presentation. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, M.D. et al.*, DAB No. 1264 (1991). *See, e.g.*, *Lawrence J. White, D.D.S.*, DAB CR1584 (2007); *Becalo Utuk*, DAB CR1547 (2006); *Edmund Ontiveros*, DAB CR1399 (2006).

Nevertheless, the evidence of Petitioner's conviction is clear and uncontradicted: I.G. Exs. 6, 18, and 19, as well as P. Ex. 1, all show that on November 9, 2006, Petitioner appeared with counsel and an official court interpreter in the Superior Court and pleaded *nolo contendere* to the crime of Elder or Dependent Adult Abuse, in violation of CAL. PENAL CODE § 368(c). The trial court's acceptance of her counseled and negotiated plea is demonstrated by the fact that the trial court found Petitioner guilty and proceeded immediately to the imposition of sentence. I.G. Exs. 6, 18, 19; P. Ex. 1. Those events satisfy the definitions of "conviction" set out at sections 1128(i)(2) and 1128(i)(3) of the Act. The I.G. has proven the first essential element.

The Misdemeanor Complaint on which Petitioner was convicted and sentenced recites the name of the victim of her abuse, alleges that the victim was "an elder and dependent adult," and that Petitioner then and there had "the custody and care of said victim." I. G. Ex. 5. The facts behind those allegations are these: FSH-M provided Medi-Cal services to the victim as its client; Petitioner was employed by FSH-M as a caregiver; and the victim was a Medi-Cal beneficiary on an outing organized by FSH-M and in Petitioner's care and custody when she abused him. I.G. Exs. 5, 7, 8, 9, 12, 14, 15. There is an obvious nexus and common-sense connection between the crime of which Petitioner was convicted and the delivery of an item or service under the Medi-Cal program. *Berton Siegel, D.O.,* DAB No. 1467. The I.G. has proven the second element.

Petitioner's defense to the exclusion is organized into three major parts. The first part is her denial that she was actually guilty of the charged act or acts of abuse; she asserts, and has submitted statements by others in support of her assertion, that she was in fact trying to assist the FSH-M client when he became upset, agitated, and combative. I.G. Ex. 4, at 1-3, 8-12. It is simply too late for Petitioner to make that argument now. If that is her contention, she should have made it in the Superior Court instead of pleading *nolo contendere*. She may not make it here. Any form of collateral attack on predicate convictions in exclusion proceedings is precluded by regulation at 42 C.F.R. § 1001.2007(d), and that preclusion has been affirmed repeatedly by appellate panels of the Departmental Appeals Board (Board). *Susan Malady, R.N.,* DAB No. 1816 (2002); *Dr. Frank R. Pennington, M.D.*, DAB No. 1786 (2001); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Paul R. Scollo, D.P.M.*, DAB No. 1498 (1994); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993).

The second part of Petitioner's defense to the exclusion is less well-articulated, but it is based on her assertion now that, at the time of her plea and conviction, she was unaware that the conviction could result in the imposition of this sanction. Whether her assertion is true or not is immaterial, for assuming *arguendo* that she had been ignorant of the mandatory operation of section 1128(a) of the Act when she tendered her plea, her ignorance would neither invalidate the conviction nor bar the exclusion. *Timothy Wayne Hensley*, DAB CR1415 (2006); *Stella Remedies Lively*, DAB CR1369 (2005); *Steven Caplan, R.Ph.*, DAB CR1112 (2003, *aff'd Steven Caplan v. Tommy G. Thompson*, Civ. No. 04-00251 (D. Hawaii, Dec. 17, 2004).

The third component of Petitioner's defense to the exclusion is that the proposed five-year period is too long, unnecessarily harsh, and therefore unreasonable. She relies on statements submitted in support of her good character to support her contention, and I understand her emphasis on the early termination of her probation to address the same notion. P. Ex. 2. But the five-year period of exclusion proposed in this case is the statutory minimum required by section 1128(c)(3)(B) of the Act. As a matter of law, it is not unreasonable. 42 C.F.R. § 1001.2007(a)(2). Neither the Board nor I may reduce it. *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002); *Krishnaswami Sriram, M.D.*, DAB CR1463 (2006), *aff'd,* DAB No. 2038 (2006).

As I have noted above, for all practical purposes Petitioner appears here *pro se*. Because of that I have taken additional care in reading her pleadings, and have searched them for any arguments or contentions that might raise a valid, relevant defense to the proposed exclusion. That search has been unproductive: I have found nothing that by any reasonable standard could be so construed. Her conviction, as I have observed above, satisfies the two elements essential in a proceeding under section 1128(a)(1). There are

no disputed issues of material fact. The undisputed facts are clear and not subject to conflicting interpretation. Those facts demonstrate that the I.G. is entitled to judgment as a matter of law. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. This Decision is issued on that basis.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Marietje Kindangen 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