

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Charmaine Sue Moon,	)	Date: April 14, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-760
	)	Decision No. CR1769
The Inspector General.	)	

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**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 herein, Charmaine Sue Moon, 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)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). The facts in this case mandate the imposition of a five-year exclusion, and for that reason I grant the I.G.’s Motion for Summary Affirmance.

**I. Procedural Background**

Petitioner Charmaine Sue Moon is a pharmacist and was in 2003 and 2004 licensed to practice as a pharmacist in the State of Michigan. In 2004 she was employed at a pharmacy located in Rochester Hills, Michigan, where, in late November, 2004, a co-worker observed and reported irregularities in the way Petitioner had processed certain prescriptions. The co-worker’s reported observations eventually came to the attention of law-enforcement authorities.

Eventually Petitioner was named in a nine-count Information filed by the Oakland County Prosecuting Attorney. Counts 1, 2, 3, and 4 of that Information charged her with four felony counts of Fraudulent Insurance Acts in violation of MICH. COMP. LAWS § 500.4511(1); Count 5 charged one felony count of Obtaining a Controlled Substance by Fraud, in violation of MICH. COMP. LAWS § 333.7407(1)(c); Counts 6, 7, 8, and 9 charged four misdemeanor counts of Making a False Prescription, in violation of MICH. COMP. LAWS § 333.17766(c).

The date on which the Information was filed is not clear on this record, but, on August 4, 2005, as the apparent result of a negotiated plea, Petitioner appeared with counsel in the Sixth Circuit Court, Oakland County, Michigan, and pleaded guilty to six of the nine charges set out in the Information. She admitted the three felonies related to insurance fraud charged in Counts 2, 3, and 4, and the three misdemeanors related to false prescriptions charged in Counts 7, 8, and 9. Petitioner was sentenced on September 15, 2005, to an eighteen-month term of probation, was ordered to perform 200 hours of community service, and was assessed various costs and restitution in the total sum of \$8255. Counts 1, 5, and 6 of the Information were dismissed.

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 July 31, 2007 the I.G. notified Petitioner that she was to be excluded pursuant to the terms of section 1128(a)(3) of the Act for the mandatory minimum period of five years.

Acting through counsel, Petitioner timely sought review of the I.G.'s action by letter dated September 27, 2007. I convened a telephonic prehearing conference on November 18, 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. The parties agreed that the case likely could be decided on written pleadings, and by Order of November 10, 2007, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case closed on February 26, 2008.

The evidentiary record on which I decide the issues before me comprises five exhibits. The I.G. proffered four exhibits marked I.G. Exhibits 1-4 (I.G. Exs. 1-4). Petitioner proffered a single exhibit, inexplicably marked Petitioner's Exhibit 4 (P. Ex. 4). Petitioner's objection to I.G. Ex. 3 is over-ruled, and the I.G.'s objection to P. Ex. 4 is over-ruled. All proffered exhibits are admitted as designated

## **II. Issues**

The issues before me are set out 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 proposed five-year period of exclusion is unreasonable.

The settled law of this forum entitles the I.G. to summary judgment on both issues. Section 1128(a)(3) of the Act mandates Petitioner's exclusion, for her predicate conviction has been established. A five-year period of exclusion is reasonable *ipso jure*, 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)(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 regulation implementing section 1128(a)(3) appears at 42 C.F.R. § 1001.101(c)(1).

The crime of Fraudulent Insurance Act is defined as a felony in Michigan and is proscribed by MICH. COMP. LAWS § 500.4511(1), which provides:

A person who commits a fraudulent insurance act under section 4503 is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$50,000.00, or both . . .

In Michigan, the crime of Obtaining a Controlled Substance by Fraud is prohibited by MICH. COMP. LAWS § 333.7407(1)(c), which makes it a felony to:

Acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.

Based on another provision of Michigan law, the misdemeanor offense of Making a False Prescription is defined by MICH. COMP. LAWS § 333.17766(c) as conduct that “[f]alsely makes, utters, publishes, passes, alters, or forges a prescription.”

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 in section 1128(a)(3) 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 pleas of guilty on August 4, 2005, in the Sixth Circuit Court for Oakland County, Michigan, Petitioner Charmaine Sue Moon was found guilty of three felony offenses of Fraudulent Insurance Acts in violation of MICH. COMP. LAWS § 500.4511(1), as well as three misdemeanor offenses of Making a False Prescription, in violation of MICH. COMP. LAWS § 333.17766(c). I.G. Exs. 2, 3, 4.
2. Final judgment of conviction was entered against Petitioner and sentence was imposed upon her in the Circuit Court on September 15, 2005. I.G. Ex. 2.
3. The accepted pleas of guilty, findings of guilt, judgment of conviction, and sentence described above 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.
4. The felony criminal offenses to which Petitioner pleaded guilty and of which she was found guilty (as noted above in Findings 1 and 2), and on which pleas and finding of guilt the final judgment of conviction was entered and sentence imposed, as noted in Finding 3, related to fraud in connection with the delivery of a health care item or service and occurred after August 21, 1996. I.G. Exs. 2, 3, 4.

5. On July 31, 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)(3) of the Act. I.G. Ex. 1.
6. Acting through counsel, Petitioner perfected her appeal from the I.G.'s action by filing a timely hearing request on September 27, 2007.
7. By reason of Petitioner's conviction, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.
8. 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).
9. 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).
10. 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 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); *Morganna Elizabeth Allen*, DAB CR1478 (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 has been convicted of felonies. The evidence of her conviction on three felony charges and three related misdemeanor charges is clear and undisputed. I.G. Ex. 2, at 6, shows that on August 4, 2005, Petitioner appeared with counsel in the Circuit Court and pleaded guilty to all six charges. The trial court's acceptance of her guilty pleas is demonstrated by the fact that the trial court found Petitioner guilty and proceeded six weeks later with the imposition of sentence. I.G. Ex. 2, at 7-8. Those events satisfy the definitions of "conviction" set out at sections 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act. The I.G. has proven the first essential element.

Nor is there any serious question about the fourth essential element: the Information recites dates in October and November 2005 for each of the three felony convictions, and all are after August 21, 1996. The I.G. has proven the fourth essential element.

The second essential element is also met in this case. Element two is established when the conviction is for an offense involving fraud or other financial misconduct. Petitioner pleaded guilty to three counts of insurance fraud. I.G. Exs. 2, 3, 4. As the charges state, fraudulent insurance acts involve presenting to an insurer an oral or written statement "knowing that it contained false information concerning a fact material to an insurance claim, and did so intending to injure, defraud, or deceive." I.G. Ex. 2, at 1. Petitioner acted fraudulently when placing prescriptions for herself in the name of another.

Further, the third essential element is likewise established by the facts. In determining whether an offense is related to the delivery of a health care item or service, appellate panels of the Departmental Appeals Board have been consistent in their approach, considering whether there is a "common sense connection" or "nexus" between the offense of which a petitioner was convicted and the delivery of a health care item or service. *Andrew D. Goddard*, DAB No. 2032; *Kenneth M. Behr*, DAB No. 1997; *Erik D. DeSimone, R.Ph.*, DAB No. 1932.

In *DeSimone*, the Board found that theft of a drug by a pharmacist "while under the guise of performing his professional responsibilities" fit the required "common sense connection" to delivery of health care items or services. DAB No. 1932, at 5. Similarly, in *Goddard*, a pharmacist convicted for theft of one tablet of a diuretic had an established nexus because, when performing his duties of dispensing drugs to the general public, the drug was stolen. DAB No. 2032.

Petitioner argues in her brief that the facts that form the basis of the insurance fraud convictions are not connected to the delivery of a health care item or service within the meaning of section 1128(a)(3) of the Act. I find to the contrary. Petitioner, a licensed pharmacist, undertook a prohibited act “while under the guise of performing [her] professional responsibilities.” *See DeSimone*, DAB No. 1932, at 5. In her capacity as an employee of a pharmacy, Petitioner had access to customer information that she utilized to alter prescriptions submitted as part of insurance claims. I.G. Exs. 2, 3, 4. It was in her performance of her duty to fill prescriptions for the general public that she altered a prescription from her name to another’s name. Though the offenses in *DeSimone* and *Goddard* were theft, and Petitioner here was convicted of making fraudulent insurance claims, the charges fulfill the “common sense connection” requirement.

Petitioner also appears to be fighting the underlying conviction by denying her fundamental guilt of the charges. This type of collateral attack on a predicate conviction in an exclusion proceeding is forbidden by case law and regulation. Even if Petitioner’s self-absolving arguments had merit, they would nonetheless constitute collateral attacks on the underlying convictions. The settled rule is that collateral attacks on the soundness or the validity of a predicate conviction are impermissible in this forum. *Judy Pederson Rogers & William Ernest Rogers*, DAB No. 2009 (2006); *Hassan M. Ibrahim, M.D.*, DAB No. 1613 (1997); *George Iturralde, M.D.*, DAB No. 1374 (1992); *Olufemi Okonuren, M.D.*, DAB No. 1319 (1992); *see also Mark C. Sorensen, M.D.*, DAB CR1664 (2007). Those cases are supported by the controlling regulation, 42 C.F.R. § 1001.2007(d). Nor may the effect of Petitioner’s guilty pleas be avoided by the claim that she was unaware of their consequences. *Stella Remedies Lively*, DAB CR1369 (2005); *Steven Caplan, R.Ph.*, DAB CR1112 (2003), *aff’d Steven Caplan v. Thompson*, CIV No. 04-0025 1 (D. Haw. Dec. 17, 2004).

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 in the I.G.’s favor 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 should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Charmaine Sue Moon 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, 42 U.S.C. § 1320a-7(a)(3), is thereby affirmed.

/s/

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Richard J. Smith  
Administrative Law Judge