Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Virginia Planas, D.C.,	)	Date: August 15, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-305
	)	Decision No. CR1831
The Inspector General.	)	
	)	

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Affirmance of his determination to exclude Petitioner *pro se* Virginia Planas, D.C., from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, based on the terms of section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). I grant the I.G.'s Motion.

I. Procedural Background

Virginia Planas, D.C., was a Florida chiropractor when, in 2004 and 2005, she became professionally associated with Plantation Medical Recovery Center, Inc. (Plantation), and Dial Medical Rehab, Inc. (Dial Medical). On July 14, 2005, the Federal Grand Jury sitting for the United States District Court for the Southern District of Florida returned an Indictment naming Petitioner and 21 others, including the business entities Plantation and Dial Medical, as defendants in an elaborate conspiracy to defraud a number of private health-insurance and auto-insurance carriers and, through another conspiracy, to conceal the proceeds of that illegal activity.

The Grand Jury handed up a Superseding Indictment on September 26, 2006. That document charged the same 22 defendants with a total of 40 felony violations of federal law and recited a forfeiture claim based on 18 U.S.C. § 982. Petitioner was charged in a single count of the Superseding Indictment: Count 22 charged her and co-defendant

Dmitry Rakovsky with having falsely stated that she was "one hundred percent owner of 1st Florida Medical Group, Inc., formerly known as Dial Medical," a violation of 18 U.S.C. § 1035, False Statements Relating to Health Care Matters.

Assisted by counsel, Petitioner in late December 2006 negotiated a plea agreement with the United States and agreed to plead guilty as charged in the Superseding Indictment. The date of her guilty plea does not appear in this record, but on March 28, 2007 Petitioner appeared with counsel in United States District Court and was sentenced to a three-year term of probation, fined $1000, and assessed a special fee of $100.

Acting on the authority of section 1128(a)(3) of the Act, the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. On December 31, 2007, the I.G. notified Petitioner that she was to be excluded for a period of five years, the mandatory minimum period of exclusion established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B).

Petitioner timely sought review of the I.G.'s action by her *pro se* letter of February 14, 2008. On the authority of 42 C.F.R. § 1005.6, I convened a prehearing conference by telephone on April 8, 2008, to discuss the issues presented by the case and the procedures best suited for addressing those issues. The parties agreed that the case could be decided on written submissions, and I established a schedule for the submission of documents and briefs. The results of that conference appear in the Order of April 8, 2008. Briefing is now complete; the record in this case closed on July 15, 2008. Throughout these proceedings Petitioner has appeared *pro se*.

The evidentiary record on which I decide this case comprises the 10 exhibits proffered by Petitioner (P. Exs. 1-10) and the six exhibits proffered by the I.G. (I.G. Exs. 1-6). In admitting all proffered exhibits, I overrule Petitioner's objection to I.G. Ex. 4.

II. Issues

The factual and legal 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 five-year term of the exclusion is unreasonable.

I resolve both issues in favor of the I.G.'s position. I find a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act, and I conclude that the five-year term of exclusion, the minimum established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), is reasonable as a matter of law.

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). It states, in relevant part, that the I.G. must exclude any individual who:

> [h]as been convicted, under Federal or State law, of a felony . . . relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct . . . [i]n connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such items or services[.]

The Act defines "convicted" as including those circumstances, among others:

> (1) when a judgment of conviction has been entered against the individual . . . by a Federal . . . court, regardless of 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 . . . court; (or)
>
> (3) when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal . . . court[.]

Act, section 1128(i)(1)-(3); 42 U.S.C. §§ 1320a-7(i)(1)-(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, section 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. The I.G. has not sought to enhance the five-year mandatory minimum period in this case, and so I may not consider any of the specific aggravating or mitigating factors set out at 42 C.F.R. §§ 1001.102(b) and (c).

IV. Findings and Conclusions

I find and conclude:

1. On March 28, 2007, in the United States District Court for the Southern District of Florida, Petitioner Virginia Planas, D.C., was adjudicated guilty and convicted on her plea of guilty to False Statements Relating to Health Care Matters, in violation of 18 U.S.C. § 1035, a felony, and was sentenced. I.G. Ex. 2; P. Ex. 2.

2. The plea, conviction, and sentence as described above in Finding 1 constitute a felony "conviction" within the terms of sections 1128(a)(3) and 1128(i)(1), (2) and (3) of the Act, and 42 C.F.R. § 1001.2.

3. The conduct that resulted in Petitioner's conviction as described above in Findings 1 and 2 related to fraud in connection with the delivery of a health care item or service. I.G. Exs. 2, 4, 5.

4. The conduct that resulted in Petitioner's conviction as described above in Findings 1 and 2 occurred on or about January 3, 2005, and thus after August 21, 1996. I.G. Ex. 4, at 25.

5. By reason of her conviction of a felony offense related to fraud in connection with the delivery of a health care item or service that occurred after August 21, 1996, Petitioner was subject to, and the I.G. was required to impose, a period of exclusion from participation in Medicare, Medicaid, and all other federal health care programs. Act, section 1128(a)(3).

6. On December 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.

7. Acting *pro se*, Petitioner perfected her appeal from the I.G.'s action by filing a timely hearing request on July 29, 2005.

8. The I.G. reasonably set the period of Petitioner's exclusion at five years, the mandatory minimum term provided by law. Act, section 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

9. There are no disputed issues of material fact before me and summary disposition on the written submissions is appropriate in this matter. *Thelma Walley*, DAB No. 1367 (1992).

V. Discussion

The 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); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Jeremy Robinson*, DAB No. 1905 (2004); *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 concedes that she pleaded guilty to and was convicted of a felony, a violation of 18 U.S.C. § 1035. She concedes that her misconduct occurred after August 21, 1996. The first and fourth essential elements are thus established without the need for further discussion. The second and third elements are what Petitioner contests.

Petitioner's contention with respect to the second essential element takes two forms. Her argument's first form amounts to a denial of any real wrongdoing at all. In support of this effort she emphasizes her comparative inexperience in health-care administration and her assertion that she derived no personal gain from her part in the indicted scheme. But the fact remains that she negotiated and tendered a guilty plea to a violation of 18 U.S.C. § 1035, that she did so with the advice and assistance of counsel, and that she was adjudicated guilty on that plea, convicted, and sentenced accordingly. Her argument could, of course, have been offered as a defense to the criminal charge, but she has admitted her guilt by her guilty plea in United States District Court and she may not make

that argument here. 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).

Her argument takes its second form in her staunch denial that the crime she admitted and of which she was convicted involved conduct related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. An answer to her argument begins and ends with a review of the statute itself. 18 U.S.C. § 1035 purports to forbid, by its very title, False Statements Relating to Health Care Matters. The goal and effect of its language are just as clear:

> (a) Whoever, in any matter involving a health care benefit program, knowingly and willfully–
>
> > (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or
> >
> > (2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.
>
> (b) As used in this section, the term "health care benefit program" has the meaning given such term in section 24(b) of this title.

The definition of "health care benefit system" set out at 18 U.S.C. § 24(b) reads:

> (b) As used in this title, the term "health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

It is simply impossible to imagine a clearer statutory definition of a crime committed by fraud and committed in the context of the delivery of a health care item or service. For that reason I believe it unnecessary here to perform the factual analysis of Petitioner's conduct described in *Berton Siegel*, *D.O.*, DAB No. 1467 (1994), in order to detect the "nexus"and "common sense connection" of her conduct to the delivery of a health care item or service. The requisite nexus and connection are patent in the plain language of the statute she admitted violating. I conclude, therefore, that Petitioner's conviction, based on her violation of 18 U.S.C. § 1035, satisfies the second essential element as a matter of law.

Petitioner's contention regarding the third essential element is based on her mistaken reading of section 1128(a)(3) of the Act. Petitioner apparently believes that the statutory language demands that the I.G. prove not only that the predicate conviction occurred in connection with the delivery of a health care item or service, but that the I.G. also prove that the crime took place in the context of a health care program operated or funded by a government agency. Petitioner's Answer Brief at 6-7. Her argument has been made in this forum before, but those arguments did not prevail, nor can the one at hand prevail now, over settled precedent in this forum and before the Board. The I.G. must prove *either* that the predicate conviction was based on conduct in connection with the delivery of a health care item or service, *or* must prove that the predicate conviction was based on conduct that occurred in the context of a government health care program. The I.G. is *not* obliged to prove *both*.

The disjunctive and separate classification of predicate convictions identified by section 1128(a)(3) of the Act was settled by the Board in *Erik D. DeSimone, R.Ph.*, DAB No. 1932. The Board's ruling in *DeSimone* has been applied by the Administrative Law Judges (ALJs) of this forum in a series of cases arising from conduct and convictions similar to those in this case, and based on a theory similar to that urged here. *Morganna Elizabeth Allen*, DAB CR1479 (2006); *Robert F. Tschinkel, R.Ph.*, DAB CR1323 (2005); *Michael Patrick Fryman*, DAB CR1261; *Golden G. Higgwe, D.P.M.*, DAB CR1229; *Thomas A. Oswald, R.Ph.*, DAB CR1216.

The Board's *DeSimone* analysis, as reflected in the ALJ's decision in *Fryman*, has won explicit approval in the Article III federal courts. The Board affirmed the ALJ's decision in *Fryman* by memorandum Order in *Michael Patrick Fryman*, DAB No. 1965 (2005); no separate decision was issued. Fryman pursued his appeal in United States District Court. That court affirmed the ALJ and the Board, and specifically wrote that with respect to the exclusion remedy established by section 1128(a)(3): "The court affirms the conclusion of the ALJ that no nexus to

a government-funded health care program is required with respect to a conviction in connection with the delivery of a health care item or service." *Fryman v. Leavitt*, No. 3-CV-256-S, at 7 (W.D. Ky., June 29, 2006). The third essential element has been established.

Petitioner describes the five-year term of exclusion as "abusive" and presumably regards it as unreasonable.[*] The five-year period of exclusion proposed in this case is the absolute 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. *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002); 42 C.F.R. § 1001.2007(a)(2).

Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Michael J. Rosen, D.C.*, DAB No. 2096 (2007); *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. 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 Virginia Planas, D.C., from participation in Medicare, Medicaid, and all other federal health care programs for a term of five years, pursuant to the terms of section 1128(a)(3) of the Act, is sustained.

/s/
Richard J. Smith
Administrative Law Judge

[*] At least twice in her pleadings Petitioner has asserted that these exclusion proceedings are "personal and discriminatory for my origin as a Latin woman." *See* Petitioner's Summary of the Respon[se] Brief at 1; Petitioner's Respon[se] Brief at 5. That is an unjustified and fundamentally gratuitous allegation: there is no evidence whatsoever at any place in the record before me to warrant or excuse it. That record gives the lie to Petitioner's assertion, and I would so find without hesitation if such a finding were necessary to resolution of the issues before me.