Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Thomas Edward Zawlocki,	)	Date: August 14, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-307
	)	Decision No. CR1990
The Inspector General.	)	
	)	

DECISION

Thomas Edward Zawlocki (Petitioner) appeals the decision of the Inspector General (I.G.), made pursuant to section 1128(a)(3) of the Social Security Act (Act), to exclude him from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner for the mandatory period of five years.

I. Background

During the time period relevant to this case, Petitioner *pro se* was working as a licensed pharmacist in the State of Michigan. Petitioner was employed as a pharmacist at a Walgreens Pharmacy (Walgreens) in Muskegon County, Michigan. I.G. Exhibit (Ex.) 3; I.G. Ex 4. On June 8, 2007, Petitioner was charged with two counts of criminal conduct,[1] one of which included embezzlement in violation of Mich. Comp. Laws § 750.174(4)(a)[2] I.G. Ex. 4. Petitioner was represented by counsel and pled *nolo contendere* to the felony charge of embezzlement on October 10, 2007, in the 14th Judicial Circuit, Muskegon

[1] Although the court records before me show that Petitioner was charged and also pled *nolo contendere* to one-count of possession of a controlled substance, the I.G. is not basing Petitioner's exclusion on the possession conviction and, therefore, I do not address that conviction in this Decision. *See* I.G. Exs. 4, 5, 6, 7.

[2] This offense is deemed a felony under Michigan law. Mich. Comp. Laws § 750.174(4)(a).

County, Michigan. I.G. Ex. 5. Petitioner's *nolo contendere* plea was accepted by the Court and on November 26, 2007, he was sentenced to 18 months probation and ordered to pay $680 in court costs. I.G. Exs. 5, 7.

Petitioner was notified by the I.G. by letter dated December 31, 2008, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years. The letter explained that the exclusion action was taken pursuant to Petitioner's felony conviction in the State of Michigan, 14th Judicial Circuit, Muskegon County, of a criminal offense requiring exclusion under section 1128(a)(3) of the Act. Petitioner timely filed a request for hearing by an administrative law judge (ALJ) by letter dated February 18, 2009.

This case was assigned to me for hearing and decision on March 16, 2009. I convened a prehearing conference on April 16, 2009, the substance of which is memorialized in my order of that date. Petitioner indicated that he was appealing only the date his exclusion was to commence. He argued that it should commence on the date of his conviction, July 18, 2007, and not the effective date set forth in the I.G.'s notice letter, 20 days from December 31, 2008. I informed Petitioner that I am only authorized to decide whether there is a basis for his exclusion and whether the length of his exclusion is unreasonable. I further explained that where a mandatory five-year exclusion is imposed, I do not have the authority to reduce the period of exclusion. Petitioner was also informed that I have no authority to change the effective date of the commencement of the I.G. exclusion. I asked Petitioner if, based on the information I provided, he wished to challenge whether the I.G. had a basis to impose an exclusion against him. Petitioner indicated he wished to proceed with his appeal. I informed Petitioner that he could make his argument relative to the effective date of the exclusion and that issue would be preserved for appeal to a court with the authority to address that question. Both parties agreed that a hearing based on an exchange of written briefs was sufficient, and that testimony of witnesses was not required. The parties agreed to brief the issues of whether Petitioner was convicted of a criminal offense as well as the issue of the commencement date of Petitioner's exclusion. *See* Order dated April 16, 2009.

On May 11, 2009, I received the I.G.'s Brief on the Merits (I.G. Br.) along with seven exhibits, I.G. Ex. 1through I.G. Ex. 7. Petitioner did not file his brief by the June 22, 2009 filing deadline outlined in my Order dated April 16, 2009. I issued an Order to Show Cause directing Petitioner to respond to that order by July 13, 2009. Petitioner failed to file a response. Therefore, the record in this matter was closed on July 24, 2009, and this Decision issues accordingly.

The evidentiary record on which I decide the issues before me contains seven exhibits, all proffered by the I.G. Petitioner offered no exhibits of his own and did not object to the I.G.'s proffer. I therefore admit I.G. Ex. 1 through I.G. Ex. 7.

II. Issue

The legal issues before me are as follows:

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;

2. Whether the five-year term of the exclusion is unreasonable; and

3. Whether I have the authority to change the effective date of Petitioner's exclusion.

As discussed below, my authority is limited in scope by the Secretary of the Department of Health and Human Services' (Secretary) regulations. The first two issues listed above are within my authority to review and must be resolved in favor of the I.G.'s position. Because his predicate conviction has been established, section 1128(a)(3) 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. As for the last issue, the regulations do not permit me to provide a retroactive application of the date of Petitioner's exclusion. Because Petitioner appears here *pro se*, I have taken extra measures of consideration in affording Petitioner opportunity to develop his case.

III. Applicable Law

Petitioner is afforded the right to a hearing by an ALJ and judicial review of the final action of the Secretary pursuant to section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I have jurisdiction over this matter.

The Act defines "conviction" as including those circumstances "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal, State, or local court." Act § 1128(i)(3); 42 C.F.R. § 1001.2.

Section 1128(a)(3) of the Act directs the Secretary to exclude an individual convicted of a felony "relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" in connection with the delivery of a health care item or service. *See* 42 C.F.R. § 1001.101(c)(1). Individuals excluded under section 1128(a)(3) must be excluded for a period of not less than five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

IV. Findings of Fact and Conclusions of Law

I make findings of fact and conclusions of law to support my decision in this case. I set forth each finding below, in italics, as a separate lettered heading.

> ***A. Petitioner was convicted of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct 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 within the meaning of section 1128(a)(3) of the Act.***

Section 1128(a)(3) of the Act requires that any individual or entity convicted of a felony offense related to health care fraud after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996[3] (HIPAA) be excluded from all health care programs. Specifically, it mandates the Secretary to exclude from participation in any federal health care program –

> [a]ny individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 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 . . . 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 relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Act § 1128(a)(3). "Convicted" is defined in the Act in section 1128(i), and subsection (i)(3) states that an individual or entity is deemed "convicted" of a criminal offense "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal, State, or local court." Act § 1128(i)(3). Therefore, an individual's *nolo contendere* plea will satisfy the Act's requirement of conviction of a criminal offense under section 1128(a)(3). *See also* 42 C.F.R. § 1001.2(c).

The evidence of Petitioner's conviction of a criminal offense is clear and is not contradicted. It is not disputed that on or about March 1, 2006 through August 1, 2006, Petitioner misappropriated and converted to his own use controlled substances that were intended to be dispensed to Walgreen customers with medical prescriptions. I.G. Ex. 4. Petitioner was charged with a felony offense as a result of his actions, and he pled *nolo contendere* to one-count of embezzlement (I.G. Ex. 5), a felony under the laws of the State of Michigan. I.G. Ex. 4, at 1; Mich. Comp. Laws § 750.174(4)(a). The Court accepted that plea. I.G. Ex. 6. Therefore, I find that Petitioner's entry of a *nolo contendere* plea and the acceptance of such plea by the Court constitutes a conviction

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[3] Pub. L. No. 104-191, § 211.

within the meaning of section 1128(i)(3) of the Act. Once an individual has been convicted of a criminal offense under section 1128(a)(3) of the Act, the I.G. is mandated to exclude the individual from participation in Medicare, Medicaid, and all other federal health care programs. Act § 1128(c)(3)(B).

B. Petitioner's felony conviction was "in connection with the delivery of a health care item or service."

It is well-established that theft of drugs by a pharmacist from his employer constitutes theft in connection with the delivery of a health care item. *See Erick D. DeSimone, R.Ph.*, DAB No. 1932, at 3 (2004); *Kevin J. Bowers*, DAB No. 2143 (2008). The undisputed evidence shows that Petitioner acquired controlled substances entrusted to him by his employer to dispense to customers of Walgreens. There is no dispute that Petitioner was convicted of a felony offense related to theft of the prescribed drugs. Thus, it logically follows that Petitioner's crime was committed in connection with the delivery of a health care item or service. An appellate panel of the Departmental Appeals Board has reasoned that there is a "common sense connection" in cases involving theft by pharmacy employees. *Erick D. DeSimone, R.Ph.*, DAB No. 1932, at 3 ("[T]heft of [a] drug while under the guise of performing his professional responsibilities is clearly the requisite common sense 'connection' to health care delivery that section 1128(a)(3) requires.)

In the case before me, Petitioner, a pharmacist, stole prescription drugs from his employer and diverted them for his own use. Using the same reasoning as the Board set out in the cases cited above, I find that there exists a "common sense connection" between Petitioner's theft of prescription drugs, which were intended for customer of Walgreens, and the delivery of a health care item or service.

Further, Petitioner does not deny the fact of his felony conviction, its nexus to the delivery of health care items and services, and the period of time his felonious conduct occurred. As such, the essential elements of an exclusion based on 1128(a)(3) of the Act have been established. The I.G. has provided evidence that Petitioner was convicted of a felony offense consisting of embezzlement, an offense which was committed in connection with the delivery of a health care item or service, and which occurred after the date of enactment of HIPAA. I conclude that the I.G. properly excluded Petitioner under section 1128(a)(3) of the Act.

C. The statute mandates a five-year minimum period of exclusion.

The Act requires that exclusions made pursuant to section 1128(a)(3) must be for a minimum mandatory period of five years. Act § 1128(c)(3)(B). When the I.G. imposes an exclusion for the mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2). Here, Petitioner does not dispute the reasonableness of the length of his exclusion.

is no suggestion that any of the interviewed individuals had, he/she has no way of knowing whether his/her choice will be honored.

Here, a charge nurse, misunderstanding and/or disregarding facility policy and the standard of care, declined to administer CPR to a resident who had explicitly asked for it. A second RN, an LPN and two CNAs then stood passively by while she articulated the wrong standard of care. Indeed, staff who knew better did not even correct her misimpression that the resident's collapse had not been witnessed. Regardless of whether R101 could have been revived, such pervasive ignorance and/or willingness to ignore the standard of care is likely to cause serious harm to facility residents.

I therefore find that CMS's immediate jeopardy determination is not clearly erroneous.

IV. Conclusion

Accepting as true all of Petitioner's factual assertions, I find that the facility was not in substantial compliance with the Medicare requirements governing professional services (42 C.F.R. § 483.20(k)(3)(i)), quality of care (42 C.F.R. § 483.25), and administration (42 C.F.R. § 483.75), and that these deficiencies posed immediate jeopardy to resident health and safety.

/s/ Carolyn Cozad Hughes
Administrative Law Judge