Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Joni-Isabell Ahlbeck,
(OI File No. 5-09-41032-9),

Petitioner,

v.

Inspector General,
U.S. Department of Health and Human Services,

Respondent.

Docket No. C-15-377

Decision No. CR3857

Date: May 13, 2015

DECISION

Petitioner, Joni-Isabell Ahlbeck, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)), effective September 18, 2014. Petitioner's exclusion for a minimum period of five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).[1]

---

[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

I. Background

The Inspector General (I.G.) for the Department of Health and Human Services notified Petitioner by letter dated August 29, 2014, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. The I.G. cited section 1128(a)(1) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based upon her conviction in the State of Minnesota, District Court, Fourth Judicial District, County of Hennepin, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Exhibit (Ex.) 1.

Petitioner timely requested a hearing by letter dated October 10, 2014. The case was assigned to me on November 18, 2014. On December 19, 2014, I convened a prehearing conference by telephone, the substance of which is recorded in my Prehearing Order dated December 22, 2014. On February 2, 2015, the I.G. filed a motion to dismiss and a motion for summary judgment with a supporting brief (I.G. Br.) and six exhibits marked I.G. Exs. 1 through 6. Petitioner filed her opposition to the I.G.'s motions (P. Br.) on March 17, 2015, with eight exhibits marked as Petitioner's exhibits (P. Exs.) 1 through 8.[2] The I.G. filed a reply brief on April 3, 2015 (I.G. Reply). There have been no objections to my consideration of I.G. Exs. 1 through 6 and P. Exs. 1 through 8 and they are admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state

---

[2] Petitioner's exhibits were not properly marked as required by the Prehearing Order § 8, which incorporates by reference the Civil Remedies Division Procedures. Because there is little likelihood of confusion due to the incorrect marking of Petitioner's exhibits, I have not required that Petitioner file correctly marked exhibits.

health care program. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a).[3]

Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; or when there has been a finding of guilt in a federal, state, or local court; or when a plea of guilty or no contest has been accepted in a federal, state, or local court; or when an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. 42 U.S.C. § 1320a-7(i)(1)-(4); 42 C.F.R. § 1001.2.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that provides the basis of the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

B. Issues

The Secretary has by regulation limited my scope of review to two issues:

> Whether the I.G. has a basis for excluding an individual or entity from participating in Medicare, Medicaid, and all other federal health care programs; and
>
> Whether the length of the proposed exclusion is unreasonable.

---

[3] References are to the revision of the Code of Federal Regulations (C.F.R.) in effect at the time of the I.G. action, unless otherwise indicated.

42 C.F.R. § 1001.2007(a)(1). If the I.G. imposes the minimum period of exclusion authorized for a mandatory exclusion under section 1128(a)(1) of the Act, then there is no issue of whether the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2). The I.G. proposes to exclude Petitioner for five years, the minimum authorized period. Therefore, the length of the proposed exclusion is not at issue.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioner timely filed her request for hearing, and I have jurisdiction.

2. Summary judgment is appropriate in this case.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to hearing before an ALJ, and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2-.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12).

Summary judgment is appropriate in an exclusion case 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. *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *David A. Barrett*, DAB No. 1461 (1994); *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367 (1992); *Catherine L. Dodd, R.N.*, DAB No. 1345 (1992); *John W. Foderick, M.D.*, DAB No. 1125 (1990). When the undisputed material facts of a case support summary judgment, there is no need for a full evidentiary hearing, and neither party has the right to one. *Surabhan Ratanasen, M.D.*, DAB No. 1138 (1990); *John W. Foderick, M.D.*, DAB No. 1125 (1990). In opposing a properly-supported motion for summary judgment, the nonmoving party must show that there are material facts that remain in dispute, and that those facts either affect the proponent's prima facie case or might establish a defense. *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 (1997). It is insufficient for the nonmovant to rely upon mere allegations or denials

to defeat the motion and proceed to hearing. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986).

There are no genuine issues of material fact in dispute in this case. Petitioner does not dispute that she was convicted within the meaning of section 1128(i) of the Act, or that the state court accepted her pleas of guilty to two criminal offenses. Petitioner also does not deny that the criminal offenses of which she was convicted relate to the delivery of an item or service under a state health care program. P. Br. at 2. Petitioner asks instead that I consider the hardship the exclusion will cause and asks that the exclusion be set aside because it is unreasonable. P. Br. at 3-4, 5. The period of exclusion imposed is the minimum permitted by Congress for a mandatory exclusion and whether or not the five-year minimum period is unreasonable is not an issue before me. 42 C.F.R. § 1001.2007(a)(2). Petitioner's challenge to her exclusion must be resolved against her as a matter of law. I conclude that summary judgment is appropriate as there are no genuine disputes as to any material facts and the I.G. prevails as a matter of law on the issue of whether there is a basis for exclusion based on the undisputed facts.

The I.G. also filed a motion to dismiss pursuant to 42 C.F.R. § 1005.2(e)(4) arguing that Petitioner failed to raise any issue that may be properly addressed in a hearing. The I.G. conflates raising an issue that one must lose as a matter of law with failure to raise an issue that may be properly addressed by the ALJ. Whether or not there is a basis for exclusion is an issue properly before me under the regulations, even when Petitioner concedes as she does here that she was convicted and the conviction provides the requisite basis. Petitioner timely filed her request for hearing and her hearing request preserved her right to ALJ review of the issue of whether or not there is a basis for exclusion. The I.G.'s motion to dismiss is denied.

3. Petitioner's exclusion is required by section 1128(a)(1) of the Act.

a. Facts

The material facts of this case are undisputed. Petitioner worked as a personal care assistant for several personal care provider organizations that were registered with the Minnesota Medicaid program. I.G. Ex. 2 at 3; I.G. Ex. 3 at 3; P. Ex. 6 at 3. Prior to 2010, the Medicaid Fraud Control Unit of the Minnesota Attorney General's Office initiated an investigation that determined that Petitioner was submitting and aiding and abetting the submission of false timesheets to the organizations for which she worked. I.G. Ex. 2 at 3-10; I.G. Ex. 3 at 3-10. On March 27, 2012, a four-count criminal complaint was filed in the District Court, Fourth Judicial District, County of Hennepin, Minnesota, charging Petitioner with one count of theft of over $35,000 by false representation and three counts of theft over $5,000 by false representation. I.G. Ex. 2 at 1-3, 15; P. Ex. 6 at 1-3, 15. An Amended Complaint was filed on December 12, 2013, but the charges against Petitioner were essentially unchanged. I.G. Ex. 3 at 1-3.

Petitioner entered guilty pleas to two counts of theft of more than $5,000 by false representation on June 4, 2014. I.G. Exs. 4-5. Petitioner admitted by her guilty pleas that from October 28, 2008 to February 18, 2009 and from August 4, 2009 to February 2, 2010, she intentionally submitted and/or aided, advised, hired, counseled, or conspired with others to submit false timesheets to her employer claiming she delivered personal care assistant services. Petitioner admitted further that the timesheets were then relied upon by her employers who submitted them for reimbursement to the Minnesota Department of Human Services resulting in the payment of false claims. I.G. Ex. 3 at 2-3; I.G. Ex. 4 at 1; P. Ex. 3 at 1.

Petitioner's plea agreement provided that the charges to which she did not plead guilty would be dismissed and that the offenses to which she pleaded guilty would be treated as gross misdemeanors for purposes of sentencing. I.G. Ex. 4 at 3; I.G. Ex. 5 at 1; P. Ex. 3 at 3; P. Ex. 6 at 1. The court accepted Petitioner's guilty pleas and entered judgment against her on June 4, 2014. The court sentenced Petitioner to pay restitution of $20,000; confinement, which was stayed in part; two years of probation; and 60 days of home detention with electric monitoring or work release. The court also restricted Petitioner from seeking employment with any individual or entity that received Medicare or Medicaid funds. I.G. Ex. 5 at 2; I.G. Ex. 6; P. Ex. 5.

b. Analysis

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

> (a) MANDATORY EXCLUSION.—The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> (1) Conviction of program-related crimes.—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.

Act § 1128(a)(1). Thus, the plain language of section 1128(a)(1) of the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs, any individual or entity: (1) convicted of a criminal offense; (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or any state health care program. The definition of a "[s]tate health care program" includes state Medicaid plans. Act § 1128(h) (42 U.S.C. § 1320a-7(h)).

Petitioner does not deny that she was convicted of two criminal offenses within the meaning of 1128(i) of the Act (42 U.S.C. § 1320a-7(i)). RFH at 1-2; P. Br. at 2-3, 4, 5; P. Ex. 1 at 1-2; P. Ex. 2 at 2-3, 4, 5. As noted above, an individual is "convicted" of an offense when a plea of guilty is accepted by a state court. Act § 1128(i)(3) (42 U.S.C. § 1320a-7(i) (3). Petitioner's guilty pleas were accepted by the court. The court issued a judgment of conviction and sentenced Petitioner for the offenses of which she was convicted. I.G. Ex. 5 and 6. Accordingly, I conclude that Petitioner was convicted of a criminal offense within the meaning of 1128(i) of the Act (42 U.S.C. § 1320a-7(i)).

Petitioner does not deny that her conviction of theft by false representation involved offenses that were related to the delivery of an item or service. Petitioner also does not deny that her criminal offenses related to the delivery of an item or service under the Minnesota Medicaid program. Petitioner admitted by her pleas that she submitted to her employer false time sheets for personal care assistant services and that those false timesheets were the basis for claims submitted to the state Medicaid program for payment. I.G. Ex. 3 at 2-3; I.G. Ex. 4; I.G. Ex. 5 at 1; P. Ex. 3. The submission of false claims to the Medicaid program constitutes a program-related crime. *Dewayne Franzen*, DAB No 1165 (1990) (the inquiry is whether the conviction is related to Medicaid fraud, not whether the petitioner was convicted of Medicaid fraud.). I conclude that Petitioner's offenses related to the delivery of an item or service and that the delivery of these services was under a state health care program, here the Minnesota Medicaid program.

Accordingly, I conclude that all three elements of section 1128(a)(1) of the Act are met and there is a basis for Petitioner's exclusion.

Petitioner raises several arguments related to her guilty pleas and her conviction. RFH at 1-2; P. Br. at 3; P. Ex. 1 at 1-2, 4; P. Ex. 2 at 3. However, Petitioner may not collaterally attack her conviction in this forum and I have no authority to review the underlying conviction. 42 C.F.R. § 1001.2007(d).

I have concluded that there is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act. The I.G. has no discretion under the Act not to exclude Petitioner when the elements of section 1128(a)(1) are satisfied as they are in this case.

4. Five years is the minimum authorized period of exclusion for an exclusion pursuant to section 1128(a) of the Act.

5. Petitioner's exclusion for five years is not unreasonable as a matter of law.

Congress established five years as the minimum period of exclusion for exclusions pursuant to section 1128(a) of the Act. Act § 1128(c)(3)(B). Pursuant to 42 C.F.R. § 1001.2007(a)(2), when the I.G imposes an exclusion pursuant to section 1128(a) of the

Act for the statutory minimum period of five years, there is no issue of whether or not the period is unreasonable. Accordingly, I conclude that Petitioner's exclusion for a period of five years is not unreasonable as a matter of law.

Petitioner argues that she should not be excluded because it will create a financial hardship for her family as the exclusion prohibits her from employment in the health care field, precludes her from applying her associates degree in human services, and creates an impediment to her pursuit of a degree in criminal justice. RFH at 1-2; P. Br. at 2-3, 4, 5; P. Ex. 1-2 at 1 P. Ex. 2 at 2-3, 4, 5. I appreciate that exclusion will adversely impact Petitioner's ability to obtain employment and provide for her family. But the five-year period of exclusion is the minimum period authorized by Congress. The I.G. has no discretion to impose a lesser period, and I may not reduce the period of exclusion below five years. Petitioner's hardship argument cannot be considered to reduce the period of her exclusion. The Departmental Appeals Board (Board) observed in *Joann Fletcher Cash*, DAB No. 1725 (2000) that the point of exclusion is to prevent untrustworthy individuals from involvement with protected health care programs. The fact that exclusion will have a limiting effect on an excluded individual's future employment is a natural and predictable consequence of an exclusion. The closing of certain occupations to Petitioner for five years and the probable loss of earnings from those occupations are no bar to the mandatory imposition of this exclusion. *Salvacion Lee, M.D.*, DAB No. 1850, at 4 (2002).

Petitioner claims that the I.G. could have imposed a civil monetary penalty in lieu of the exclusion. RFH at 1; P. Br. at 5; P. Ex. 1 at 1; P. Ex. 2 at 5. Petitioner is in error. When an individual's conviction is "related to the delivery of an item or service under Medicare or a State health care program," within the meaning of section 1128(a)(1) of the Act, exclusion is mandatory as is the five-year minimum exclusion established by section 1128(c)(3)(B) of the Act. The I.G., the ALJ, and the Board can impose no lesser exclusion. *Salvacion Lee, M.D.*, DAB No. 1850, at 4; *Lorna Fay Gardner*, DAB No. 1733, at 6 (2000); *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Napoleon S. Maminta, M.D.*, DAB No. 1135 (1990). I also find unavailing Petitioner's argument that she should not be excluded because she is already paying a fine and other penalties related to her sentencing. RFH at 1; P. Br. at 5; P. Ex. 1 at 1; P. Ex. 2 at 5. Exclusions imposed by the I.G. are civil sanctions, remedial in nature and neither punitive nor criminal. There is no issue of prohibited double punishment for the same offense. The exclusion remedy serves twin congressional purposes: the protection of federal funds and program beneficiaries from untrustworthy individuals and the deterrence of health care fraud. S. Rep. No. 100-109, at 1-2 (1987), reprinted in 1987 U.S.C.C.A.N. 682, 686 ("clear and strong deterrent"); *Joann Fletcher Cash*, DAB No. 1725 at 18 (discussing trustworthiness and deterrence).

Petitioner submitted a letter written by the mother of a child for whom she provided services. The letter was written in support of Petitioner's return to employment in the

health care field. P. Ex. 7. However, I have no authority to reduce the period of exclusion below the mandatory minimum of five years based on the letter. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

Exclusion is effective 20 days from the date of the I.G.'s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b).

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for the minimum statutory period of five years, effective September 18, 2014.

/s/
Keith W. Sickendick
Administrative Law Judge