Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Natalya Shvets,
(O.I. File No. 3-06-40317-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-719

Decision No. CR4119

Date: August 12, 2015

DECISION

Petitioner, Natalya Shvets, 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 December 18, 2014. Petitioner must be excluded for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). An additional exclusion of three years, for a total period of exclusion of eight years,[1] is not unreasonable based upon the three aggravating factors established in this case and the absence of any mitigating factors.

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[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 of the Department of Health and Human Services (I.G.) notified Petitioner by letter dated November 28, 2014, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of eight years. The I.G. advised Petitioner that she was being excluded pursuant to section 1128(a)(1) of the Act based on her conviction in the United States District Court for the Eastern District of Pennsylvania (District Court), of a criminal offense related to the delivery of an item or service under the Medicare or a state health care program. The I.G. considered three aggravating factors when deciding to extend the five-year minimum mandatory period of exclusion to eight years. I.G. Exhibit (Ex.) 1.

Petitioner timely requested a hearing by letter dated December 2, 2014, which the Civil Remedies Division received on December 9, 2014. The case was assigned to me on January 9, 2015, for hearing and decision. On February 2, 2015, I convened a prehearing telephone conference, the substance of which is memorialized in my Prehearing Order dated February 3, 2015 (Prehearing Order). On April 3, 2015, the I.G. filed a motion for summary judgment, a brief in support of summary judgment (I.G. Br.), and I.G. Exs. 1 through 4. Petitioner filed a brief in opposition (P. Br.) and P. Exs. 1 and 2.[2] The I.G. filed a reply brief (I.G. Reply) on June 17, 2015. Neither party objected to the offered exhibits and I admit I.G. Exs. 1 through 4 and P. Exs. 1 and 2 as evidence.

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[2] Petitioner's brief and exhibits were uploaded to the Departmental Appeals Board Electronic Filing System (DAB E-File) as Item #10. The exhibits were unnumbered and not correctly marked as required by the Prehearing Order. The exhibits were not returned to Petitioner for correction because it would have been impractical for Petitioner to resubmit them within the timeframe I established for the potential resolution of this case. I treat the criminal docket record (Item #10 pages 3-15) from the District Court as if marked P. Ex. 1, pages 1-13. I treat the Notice of Appeal of Petitioner's criminal conviction as marked as P. Ex. 2 (Item #10 page 16). A more readable copy of Petitioner's brief is found in DAB E-File Item #11.

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

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). The Secretary has published regulations that establish aggravating factors the I.G. may consider to extend the period of exclusion beyond the minimum five-year period, as well as mitigating factors that may be considered only if the I.G. proposes to impose an exclusion greater than five years. 42 C.F.R. § 1001.102(b), (c).

The standard of proof is a preponderance of the evidence, and an individual subject to an exclusion may not collaterally attack 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 there is a basis for the imposition of the exclusion; and
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> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

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[3] References are to the 2013 revision of the Code of Federal Regulations (C.F.R.), unless otherwise indicated.

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's request for hearing was timely, and I have jurisdiction.

2. Summary judgment is appropriate in this case.

Petitioner's request for hearing was timely filed and preserved Petitioner's right to review of justiciable issues. I have jurisdiction.

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, 1005.3. 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 and no hearing is required where either: there are no genuine disputes of material fact and the only questions that must be decided involve application of law to the undisputed facts; or the moving party prevails as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628, at 3 (1997) (holding in-person hearing is required where the non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC, Inc.*, DAB CR672 (2000); *New Life Plus Ctr. CMHC*, DAB CR700 (2000).

Summary judgment is appropriate in this case. There are no genuine issues of material fact in dispute. I may resolve the case by applying the law to the undisputed facts.

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

The Act 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). Section 1128(a)(1) requires the Secretary to exclude from participation in Medicare, Medicaid, and all federal health care programs any individual: (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 a state health care program.

Petitioner does not dispute that on March 21, 2012, she was indicted on one count of conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349, and seven counts of health care fraud and aiding and abetting health care fraud in violation of 18 U.S.C. §§ 2 and 1347. Petitioner, a registered nurse, was charged with knowingly and willfully executing a scheme and artifice to defraud Medicare and to obtain by false and fraudulent pretenses, representations, and promises, money and property from the Medicare program in connection with the delivery of and payment for health care benefits, items and services during the period January 2005 to December 2008.[4] I.G. Ex. 2. Petitioner also does not dispute that she was convicted by a jury of one count of conspiracy to commit health care fraud and seven counts of health care fraud and aiding and abetting health care fraud as alleged in the indictment. Judgment was entered against her on August 5, 2014. I.G. Ex. 3 at 1; 4. Petitioner was sentenced to 15 months on each count with the sentences to run concurrently; three years of supervised release on each count to run concurrently; and to pay restitution of $253,196. I.G. Ex. 4 at 3-7.

Petitioner argues that she "was a victim of miscarriage of justice" because the "accusations against [her] were untrue and all the evidence against [her] were unsubstantial." P. Br. at 1. Petitioner argues that she did not submit a bill to Medicare and she did not alter any charts. She avers that she was wrongfully accused. P. Br. at 1. She states that the "DA and ADA [were] terminated from her case" and that "there is a person from Department of Justice on [her] case." P. Br. at 2. I may not consider Petitioner's arguments as a matter of law because they are collateral attacks on her underlying conviction. Petitioner may not collaterally attack her conviction before me;

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[4] It is alleged in the indictment that Petitioner falsely documented that hospice patients received a more costly level of service than they actually received, and Petitioner's employer submitted claims to Medicare for reimbursement for the higher level of service based on Petitioner's documentation. I.G. Ex. 2 at 6.

and I cannot consider such attacks because I have no jurisdiction to review her conviction. 42 C.F.R. § 1001.2007(d).

Petitioner states that she is appealing her conviction. P. Br. at 2; P. Ex. 2. A pending appeal is not a basis to stay or overturn the I.G.'s exclusion, however. An individual against whom a Federal court has entered a judgment of conviction is considered "convicted" for purposes of the Act "regardless of whether there is an appeal pending." Act § 1128(i)(1). If Petitioner succeeds in her appeal and the United States Court of Appeals for the Third Circuit orders her conviction completely reversed or vacated, the I.G. is required to remove her exclusion retroactive to its effective date. 42 C.F.R. § 1001.3005(a)(1).

It is not disputed that the District Court entered a judgment of conviction against Petitioner. Therefore, Petitioner was convicted within the meaning of the Act. Act § 1128(i)(1). Further, Petitioner was convicted of submitting false claims to the Medicare or Medicaid programs and there is clearly a nexus between the crime of which she was convicted and the delivery of a health care item or service pursuant to section 1128(a)(1) of the Act. Petitioner does not deny that her crimes were program-related crimes and involved the delivery of a health care item or service. Accordingly, all three elements of section 1128(a)(1) of the Act are met and there is a basis for Petitioner's exclusion.

4. Pursuant to section 1128(c)(3)(b) of the Act, the minimum period of exclusion under section 1128(a) is five years.

5. Three aggravating factors justify extending the minimum period of exclusion to eight years.

I have concluded that a basis exists to exclude Petitioner pursuant to section 1128(a)(1) of the Act. Therefore, the I.G. must exclude Petitioner for a minimum period of five years. Act § 1128(c)(3)(B). The I.G. has no discretion to impose a lesser period, and I may not reduce the period of exclusion below five years. The remaining issue is whether it is unreasonable for the I.G. to extend Petitioner's period of exclusion by an additional three years.

My determination of whether the exclusionary period in this case is unreasonable turns on whether: (1) the I.G. has proven that there are aggravating factors; (2) Petitioner has proven that there are mitigating factors the I.G. failed to consider or that the I.G. considered an aggravating factor that does not exist; and (3) the period of exclusion is within a reasonable range.

Petitioner does not dispute or challenge the presence of the three aggravating factors the I.G. relies on to support the three additional years of exclusion it seeks to impose upon

Petitioner, except to the extent she alleges that the criminal case against her was unfounded and is subject to being reversed on appeal. P. Br. at 1. The aggravating factors authorized by 42 C.F.R. § 1001.102(b) that are present in this case are:

- Petitioner committed acts that resulted in her conviction that caused a financial loss to a government program of $5,000 or more. 42 C.F.R. § 1001.102(b)(1). Petitioner does not dispute that the District Court ordered her to pay $253,196 in restitution to the Medicare program, which is strong and unrebutted evidence that the loss to Medicare was far more than $5,000. I.G. Ex. 4 at 6.

- Petitioner committed acts that resulted in her conviction over a period of more than one year. 42 C.F.R. § 1001.102(b)(2). Petitioner was indicted for and convicted of one count of conspiracy to commit health care fraud from "about January 2005 through in or about December 2008." I.G. Ex. 2 at 5; I.G. Ex. 4 at 1. Petitioner was also indicted for and convicted of committing seven counts of aiding and abetting health care fraud that occurred between April 2007 and August 2008. I.G. Ex. 2 at 15-17; I.G. Ex. 4 at 1-2. Therefore, Petitioner was convicted of offenses that occurred over a period of more than one year.

- The District Court imposed a sentence of incarceration on Petitioner. 42 C.F.R. § 1001.102(b)(5). It is not disputed that the District Court sentenced Petitioner to 15 months of incarceration on each count of the conviction, to run concurrently. I.G. Ex. 4 at 3.

I conclude that there is no genuine dispute as to the existence of three aggravating factors that permit the I.G. to extend Petitioner's exclusion by three years beyond the five-year minimum mandatory period, for a total minimum period of exclusion of eight years.

6. There is no genuine dispute of material fact as to the existence any mitigating factor.

7. Exclusion for eight years is not unreasonable.

Petitioner does not allege and there is no evidence of any mitigating factors that the I.G. failed to consider under 42 C.F.R. § 1001.102(c) that would cause me to reassess Petitioner's exclusion and impose a shorter period of exclusion. If the I.G. imposes a period of exclusion beyond the five-year minimum mandatory period based on the presence of aggravating factors, there are only three mitigating factors established by 42 C.F.R. § 1001.102(c) that I may consider to reduce the extended period of exclusion: (1) whether the individual was convicted of three or fewer misdemeanor offenses coupled with a financial loss of less than $1,500; (2) whether the individual was suffering from a mental, emotional, or physical condition at the time of the offense that reduced his or her culpability; or (3) whether the individual cooperated with federal or state officials

resulting in others being convicted or excluded, additional cases investigated or the imposition against anyone of civil money penalties or assessments. 42 C.F.R. § 1001.102(c)(1)-(3).

Beyond challenging her convictions, Petitioner makes several arguments that may be viewed as suggesting that she considers an eight-year exclusion unreasonable. Petitioner asserts that she never submitted "a single bill to Medicare nor alter a single chart." P. Br. at 1. She states that neither her patients nor their family members ever complained about her care. Finally, she argues that the District Court unfairly "overruled" a memorandum in support of her motion for Judgment of Acquittal and also issued faulty jury instructions. P. Br. at 1-2. None of these arguments relate to mitigating factors that I may consider under the regulations.

The District Court recommended as part of the sentencing that Petitioner "be afforded the opportunity to participate in a mental health treatment program while incarcerated." I.G. Ex. 4 at 3. This evidence does not show that there is a genuine dispute as to whether or not the District Court determined that Petitioner had a mental or emotional condition before or during her commission of the offenses of which she was convicted, that reduced her culpability. Petitioner does not argue that the evidence, if considered in a light most favorable to her, shows the existence of the mitigating factor authorized by 42 C.F.R. § 1001.102(c)(2).

I conclude that Petitioner has failed to raise any genuine dispute of material fact related to the existence of any mitigating factor I am authorized to consider under the regulations. Appellate panels of the Departmental Appeals Board (the Board) have made clear that the role of the ALJ in cases such as this is to conduct a de novo review of the facts related to the basis for the exclusion and the existence of aggravating and mitigating factors identified at 42 C.F.R. § 1001.102 and to determine whether the period of exclusion imposed by the I.G. falls within a reasonable range. *Juan De Leon, Jr.*, DAB No. 2533 at 4-5 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725 at 10, n.9 (2000). The applicable regulation specifies that the ALJ must determine whether the length of exclusion imposed is "unreasonable." 42 C.F.R. § 1001.2007(a)(1)(ii). The Board has explained that, in determining whether a period of exclusion is "unreasonable," the ALJ is to consider whether such period falls "within a reasonable range." *Cash*, DAB No. 1725 at 10, n.9. The Board cautions that whether the ALJ thinks the period of exclusion too long or too short is not the issue. The ALJ may not substitute his or her judgment for that of the I.G. and may only change the period of exclusion in limited circumstances.

I conclude that there is a basis for the I.G. to exclude Petitioner and there is no dispute as to the existence of the three aggravating factors that the I.G. relied on to impose an eight-year exclusion. There is no genuine dispute as to the existence of any authorized mitigating factors that would support a reduction of the period of Petitioner's exclusion.

No basis exists for me to reassess the period of exclusion. I conclude that a period of exclusion of eight years is in a reasonable range and not unreasonable considering the three aggravating factors present.

III. Conclusion

For the foregoing reason, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum of eight years, effective December 18, 2014.

/s/
Keith W. Sickendick
Administrative Law Judge