Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Natalie Galbo, R.N,
(OI File No. H-14-4-2824-9),

Petitioner,

v.

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

Respondent.

Docket No. C-15-2139

Decision No. CR4347

Date: October 20, 2015

DECISION

Petitioner, Natalie Galbo, R.N., is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(2) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(2)), effective March 19, 2015. 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 February 27, 2015, that she was 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)(2) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based upon her conviction in the Buffalo City Court of Erie County of the State of New York of a criminal offense related to the neglect or abuse of patients, in connection with the delivery of a health care item or service. Attachment to Request for Hearing at 1.

Petitioner timely requested a hearing on April 17, 2015. The case was assigned to me, and I convened a prehearing conference by telephone, the substance of which is recorded in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated June 15, 2015. The I.G. filed a motion for summary judgment with a supporting brief (I.G. Br.) and four exhibits marked I.G. Exhibits (Exs.) 1 through 4. Petitioner filed her opposition to the I.G.'s motion (P. Br.), with three exhibits marked as Petitioner's exhibits (P. Exs.) 1 through 3. The I.G. filed a reply brief (I.G. Reply). There have been no objections to my consideration of I.G. Exs. 1 through 4 and P. Exs. 1 through 3, and all 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)(2) 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 neglect or abuse of a patient, in connection with the delivery of a health care item or service, including any offense that the I.G. concludes resulted in neglect or abuse of patients. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(b).[2]

---

[2] 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.

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.

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)(2) 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 a 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); *Foderick*, DAB No. 1125. 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 of two criminal offenses. Petitioner argues that the conduct for which she was convicted does not relate to abuse or neglect in connection with delivery of a health care item or service. P. Br. at 2. Petitioner's arguments require application of law to the undisputed facts and, as discussed hereafter, are resolved against her. To the extent that Petitioner disputes the facts underlying her conviction (P. Br. at 3-7; P. Ex. 1), her arguments amount to collateral attacks on her conviction which are not permitted under 42 C.F.R.

§ 1001.2007(d). Therefore, Petitioner's assertions of fact other than those she admitted to as part of her plea agreement do not constitute genuine disputes of material fact that preclude summary judgment. P. Br. at 3-7. 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.

3. Petitioner's exclusion is required by section 1128(a)(2) of the Act.

a. Facts

The material facts of this case are undisputed. On December 9, 2014, Petitioner signed a "Plea Agreement and Colloquy" in which she agreed to having committed the offenses of disorderly conduct. Petitioner specifically admitted as part of her plea agreement:

> I admit that in the County of Erie, State of New York, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, I created a hazardous or physically offensive condition by an act which served no legitimate purpose, as follows: On or about and between June 11 and June 27, 2013, while I was employed as a Registered Nurse at Highpointe and assigned to physically check on the welfare of resident LM, a bedridden 56 year old male who suffered from Huntington's chorea and was totally dependent on Highpointe staff for all of his care, I signed the Q2 check sheet for resident LM, a record kept and maintained by Highpointe in the regular course of business, indicating that I had checked on resident LM when I did not.

I.G. Ex. 3 at 4-5. Based on her admitted misconduct, Petitioner pleaded guilty to two counts of disorderly conduct, violations of section 240.20(7) of the Penal Laws of the State of New York. I.G. Ex. 3 at 5. Petitioner's guilty pleas were accepted. I.G. Ex. 2 at 6-7. Petitioner was sentenced to pay a $120 surcharge, perform 200 hours of community service, and attend a "Scared Straight" program at a nursing facility if asked to do so. I.G. Ex. 2 at 7-8; I.G. Ex. 3 at 2; I.G. Ex. 4.

b. Analysis

The I.G. cites section 1128(a)(2) 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)):
>
> (2) Conviction relating to patient abuse. — Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

Act § 1128(a)(2). The plain language of section 1128(a)(2) 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 related to neglect or abuse of patients; and (3) where the offense is related to the delivery of a health care item or service.

Petitioner does not contest that she was convicted of two criminal offenses within the meaning of 1128(i) of the Act (42 U.S.C. § 1320a-7(i)). P. Br. at 2; P. Ex. 1 at 6. 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). 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. 2 at 7-8. Accordingly, I conclude that Petitioner was convicted of a criminal offense within the meaning of 1128(i) of the Act.

Petitioner argues that the facts the I.G. has offered regarding Petitioner's conduct, those contained in her plea agreement, do not tell the whole story and that if I look behind the facts to the underlying conduct, I will see that Petitioner's criminal offense did not constitute abuse or neglect. Petitioner characterizes her actions as a "singular ministerial act" and argues that the language in her plea agreement does not accurately reflect her conduct. P. Br. at 4. Her conduct was neither abuse nor neglect, she contends, because: (1) she was not assigned to provide care for resident LM; (2) she believed that the care had been provided to the resident; (3) she was not covering up the lack of delivery of a health care item or service; and (4) she reasonably believed the record would be corrected at a later time. P. Br. at 5. Petitioner filed her affidavit marked and admitted as P. Ex. 1. Petitioner argues and asserts in her affidavit that she and her attorney did not prepare the Plea Agreement and Colloquy that she signed on December 9, 2014, and agreed to in open court. I.G Ex. 2 at 6-7; I.G. Ex. 3. In her affidavit, Petitioner attests to facts different than those she agreed to in her Plea Agreement and Colloquy and admitted to in court. P. Ex. 1. Pursuant to 42 C.F.R. § 1001.2007(d), when the I.G. excludes an individual based on a criminal conviction, as here, "the basis of the underlying conviction . . . is not reviewable and the individual . . . may not collaterally attack it either on substantive or procedural grounds." 42 C.F.R. § 1001.2007(d). Accordingly, I conclude that in this proceeding Petitioner is bound by the facts she agreed to as part of her plea agreement. Petitioner cannot in this proceeding create a genuine dispute as to the facts

she admitted as part of her plea or seek to have me find that her conviction was based on incorrect facts.

Petitioner argues that her conviction of disorderly conduct did not involve abuse or neglect. She argues that "filling out information on an internal form (the 'Q2') when requested to do so by her supervisor" was neither neglect or abuse, "particularly when Petitioner was made to believe that the aide who was responsible for providing these services but neglected to fill in the data on the form" would make corrections at a later date. P. Br. at 4-5. Petitioner states she did not fail to satisfy a duty of care, willfully mistreat a patient, or fail to provide goods and services necessary to avoid harm or willful infliction of injury. She urges that her "conduct was solely related to record keeping and data entry. P. Br. at 5.

Section 1128 does not define either abuse or neglect. Previously, I have looked to definitions for those terms under 42 C.F.R. § 488.301, where abuse and neglect are defined in the context of long-term care facilities. *Yvette Greaves*, DAB CR1403 (2006). I look to those definitions here as well, which is appropriate because Petitioner concedes that she was practicing as a registered nurse and nurse manager at a nursing home when she committed her offenses. P. Ex. 1 at 3-4. Abuse is "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish." 42 C.F.R. § 488.301. Neglect is "failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness." *Id.*

I conclude that Petitioner pleaded guilty to acts that constitute neglect within the meaning of section 1128(a)(2). Specifically, Petitioner admitted as part of her plea agreement that she was "assigned to physically check on the welfare of resident LM . . . [who] was totally dependent on Highpointe staff for all of his care." I.G. Ex. 3 at 3-4. Petitioner further admitted as part of her plea that she "signed the Q2 check sheet . . . indicating that [she] had checked on resident LM when [she] did not." I.G. Ex. 3 at 5. Petitioner was assigned to provide care that she did not provide, and her care was necessary to avoid harm to resident LM because the resident was totally dependent on the facility's staff, including Petitioner, for his wellbeing. There is a sufficient nexus between Petitioner's criminal offense and the neglect of the nursing home resident. Therefore, I conclude that Petitioner was convicted of criminal offenses related to neglect of a patient because she failed to provide a necessary care or services to avoid harm to the resident.

Petitioner also argues that her actions were not in connection with the delivery of a health care item or service because she was not assigned to provide care for resident LM. P. Br. at 7. Petitioner's conduct was plainly in connection with the delivery of a health care item or service because, as she admitted as part of her plea agreement, her conduct was related to the performance of her duties as a nurse working in a nursing home. I.G. Ex. 3 at 5.

I conclude that Petitioner was convicted of criminal offense related to neglect of a patient in connection with the delivery of a health care item or service. Accordingly, I conclude that all elements of section 1128(a)(2) of the Act are met and there is a basis for Petitioner's exclusion. The I.G. has no discretion under the Act not to exclude Petitioner when the elements of section 1128(a)(2) are satisfied, as they are in this case.

4. Five years is the minimum authorized period of 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 submitted numerous performance reviews that demonstrate Petitioner's competence and good performance of her nursing duties. P. Ex. 2. However, I have no authority to reduce the period of exclusion below the mandatory minimum of five years based on Petitioner's otherwise exemplary performance of her nursing duties. 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 March 19, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge