**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Mary Ann Hanlon,
(O.I. File H-15-4-0332-9),

Petitioner,

v.

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

Docket No. C-15-2153

Decision No. CR4491

Date: December 15, 2015

# DECISION

Petitioner, Mary Ann Hanlon, 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 April 20, 2015. Petitioner's exclusion for the minimum authorized 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]

## I. Background

The Inspector General of the Department of Health and Human Services (I.G.) notified Petitioner by letter dated March 31, 2015, that she was being excluded from participation

---

[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.

in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five 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 Southampton Town Court of the State of New York 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 on April 20, 2015. Request for Hearing (RFH). The case was assigned to me on May 18, 2015, for hearing and decision. On June 8, 2015, I convened a prehearing telephone conference, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated June 9, 2015 (Prehearing Order).

On July 8, 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 7. Petitioner requested two extensions of time to file her response to the I.G.'s motion for summary judgment, which were granted on July 17, 2015 and on September 16, 2015. On October 20, 2015, Petitioner filed a third unopposed request for a 45-day extension of time to file her response to the I.G.'s motion for summary judgment citing as grounds for the request that the state courts are still reviewing her conviction. The pendency of an appeal of a criminal conviction is not good cause for an extension of time. The regulations provide that in the event a criminal conviction is reversed or vacated on appeal the excluded individual is reinstated effective the date of exclusion. 42 C.F.R. § 1001.3005. Therefore, if Petitioner's appeal from her criminal conviction is successful, she can apply to be reinstated effective the date of her exclusion. Consequently, I concluded that there was not good cause for a 45-day extension and I denied the third request for an extension of time. On October 27, 2015, Petitioner filed a one paragraph response (P. Response) to the I.G. motion for summary judgment with no exhibits. On November 2, 2015, the I.G. waived the filing of a reply. In the absence of objection I admit as evidence I.G. Exs. 1 through 7.

## 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 the Department 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 this provision of the Act. 42 C.F.R. § 1001.101(a).[2]

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. 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 is the basis for 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
>
> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). If, as in this case, the I.G. imposes the minimum authorized five-year period of exclusion under section 1128(a) of the Act, there is no issue as to whether or not the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2).

---

[2] References are to the 2014 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.**

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. 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 Medical 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. The facts that trigger exclusion under section 1128(a)(1) of the Act are conceded, undisputed, or not subject to dispute. Petitioner argues in her hearing request that "the investigation of my billing practices for one patient did not take into account that I actually provided nursing services over fourteen hours a day. I did not bill for services that I did not provide.

Instead I *unknowingly* billed for services *that I provided*, beyond the amount of total hours I was allowed to bill." RFH (italics in original). The gist of Petitioner's argument is that there are facts in dispute related to her conduct that caused her prosecution and conviction. However, as a matter of law Petitioner may not collaterally attack in this forum her conviction or the facts that were the basis for that conviction. 42 C.F.R. § 1001.2007(c), (d). As discussed in more detail in my "Analysis," I conclude that there is no genuine dispute as to the facts that support the legal conclusion that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Furthermore, 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. Accordingly, summary judgment is appropriate.

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

#### a. Facts

The following facts are drawn from the documents which were admitted without objection. The following facts are undisputed and considered true. Prehearing Order ¶ 9.

Petitioner was a Registered Nurse enrolled in the New York Medicaid program and was employed by the Dominican Sisters Family Health Services to provide home health care nursing services. On May 29, 2013, a felony complaint was filed in the Town of Southampton, County of Suffolk, State of New York, charging Petitioner with one count of grand larceny in the third degree and three counts of offering a false instrument for filing with New York Medicaid in the first degree. I.G. Ex. 3 at 1; I.G. Ex. 4. The complaint alleges that Petitioner submitted and caused to be submitted three false claims for reimbursement to New York Medicaid in which she falsely represented that she had provided nursing services to a Medicaid beneficiary from May 26, 2008 through June 1, 2008, a period during which she was out of the country on vacation. The complaint further alleges that the State of New York paid Petitioner more than $3000 to which she was not entitled. I.G. Ex. 3.

On September 23, 2014, Petitioner entered into a global settlement agreement in which she agreed to plead guilty to a criminal charge; to pay restitution of $3,600 as part of her sentence; and to confess judgment in the amount of $600,000 to resolve a civil matter related to audit claims arising from an audit investigation conducted by the Medicaid Fraud Control Unit. I.G. Exs. 5, 6. Also, on September 23, 2014, Petitioner pleaded guilty, pursuant to her plea agreement, to one misdemeanor count of offering a false instrument for filing in the second degree, in violation of New York Penal Law § 175.30. I.G. Ex. 4; I.G. Ex. 6 at 3-4; I.G. Ex. 7. On December 4, 2014, the criminal court judge accepted Petitioner's guilty plea and entered judgment against her. I.G. Ex. 7.

**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) (emphasis added).[3] The statute requires that the Secretary exclude from participation any individual or entity: (1) convicted of a criminal offense (whether felony or misdemeanor); (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 deny that she was convicted of a criminal offense within the meaning of section 1128(i) of the Act. RFH. On September 23, 2014, Petitioner pleaded guilty. On December 4, 2014, the Court accepted the plea, issued a judgment of conviction, and sentenced Petitioner for the offense of which she was convicted. I.G. Exs. 6, 7. I conclude based on these undisputed facts that Petitioner was convicted of a criminal offense within the meaning of the section 1128(i) of the Act.

The facts that I have found based on the evidence also satisfy the remaining two elements of section 1128(a)(1) of the Act, i.e., that Petitioner's offense was related to the delivery of a health care item or service, and that the delivery was under Medicare or a state health care program. I consider whether there is a common sense connection or nexus between the conduct that was the offense and the delivery of an item or service under Medicare or a state health care program. *Berton Siegel, D.O.*, DAB No. 1467 (1994). To determine whether there is a nexus or common-sense connection between the offense and the delivery of an item or service under Medicare or Medicaid, "evidence as to the nature of an offense may be considered," including "facts upon which the conviction was predicated." *Siegel*, DAB No. 1467 at 6-7. Therefore it is necessary for me to examine

---

[3] Title XVIII of the Act established the federal Medicare program which provides health insurance for the aged and disabled.

the circumstances surrounding Petitioner's conviction to determine whether it was program-related. *Siegel*, DAB No. 1467 at 6-7; *Dewayne Franzen*, DAB No. 1165 at 6 (1990) (finding that an ALJ's "task is to examine all relevant conduct to determine if there is a relationship between the judgment of conviction and the Medicaid program.").

In this case, the charge to which Petitioner pleaded guilty and of which she was convicted specifically alleges a relationship or nexus with the state Medicaid program, in that Petitioner "knowingly and intentionally submitted and caused to be submitted . . . false claims for reimbursement to . . . the Medicaid program, which falsely presented that nursing services had been provided to [a Medicaid beneficiary] by [Petitioner] during the period of May 26, 2008 through June 1, 2008. As a result, the State of New York paid her more than three thousand ($3,000) to which she was not entitled." I.G. Ex. 3 at 2. Petitioner's admissions as part of her guilty plea also clearly show a nexus between Petitioner's offense and the New York State Medicaid program. Petitioner cannot now disavow the admissions she made as part of her plea agreement in her criminal case.

Petitioner argues in her hearing request that "the investigation of my billing practices for one patient did not take into account that I actually provided nursing services over fourteen hours a day. I did not bill for services that I did not provide. Instead I *unknowingly* billed for services *that I provided*, beyond the amount of total hours I was allowed to bill." RFH (italics in original). Petitioner did not elaborate on her theory in her response to the I.G.'s motion for summary judgment. P. Response. Viewed one way, her argument may be seen as an attack on the basis for her criminal conviction contrary to her admission of guilt before the criminal court. Petitioner is bound in this forum by the facts she admitted by virtue of her guilty plea. Petitioner may not collaterally attack her conviction before me and I have no jurisdiction to review the basis for her conviction. 42 C.F.R. § 1001.2007(d). It is the fact that she was convicted of an offense related to the delivery of an item or service under New York Medicaid that is controlling. Therefore, her attempt to recharacterize the facts before me has no impact on the outcome in this case.

Viewed another way, Petitioner may be arguing that exclusion is not appropriate because she had no intent to defraud New York Medicaid. Petitioner is correct that there is no finding in the criminal case that Petitioner intended to defraud or adversely affect Medicaid. I accept as true for purposes of summary judgment that Petitioner never intended to defraud Medicaid and that she did not knowingly intend to adversely affect the Medicaid program. However, these facts and Petitioner's arguments do not establish a genuine dispute as to any material fact or a defense and the issue must be resolved against Petitioner as a matter of law. "Section 1128(a)(1) does not require that the individual . . . intend to commit a criminal offense, or indeed fraud, for an exclusion to be proper." *Franzen*, DAB No. 1165 at 8. Petitioner's intent is simply not material under section 1128(a)(1) of the Act. Section 1128(a)(1) of the Act also "does not require any knowledge on the part of a petitioner of the relationship between the offense and the

program." *Lyle Kai, R.Ph.*, DAB No. 1979 at 7 (2005). In *Kai*, the Board found "irrelevant" whether the petitioner knew that Medicaid was being billed, his specific role in the scheme, and the degree of his responsibility. *Kai*, DAB No. 1979 at 7. All that is required for a criminal offense to be program-related is that there is some nexus between the offense of which one is convicted and the delivery of an item or service under Medicare or a state health care program. There is nothing in the statutory language of section 1128(a)(1) that imposes a requirement of "intent" or knowledge. *Franzen*, DAB No. 1165; *Kai*, DAB No. 1979. A nexus exists in this case between the offense of which Petitioner was convicted and Medicaid. Petitioner pleaded guilty to the offense of offering a false instrument and the false instrument was offered for reimbursement from New York State Medicaid for services Petitioner falsely claimed were provided to a Medicaid beneficiary.

I conclude that Petitioner was convicted of an offense that was program-related 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 Petitioner's exclusion is required.

**4. The minimum period of exclusion under section 1128(a) is five years.**

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

I have concluded that there is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act. Therefore, Petitioner must be excluded for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period, and I may not reduce the period of exclusion below five years.

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 April 20, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge