Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gerald W. Jones
(O.I File No. H-15-41965-9),

Petitioner,

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-16-74

Decision No. CR4570

Date: April 5, 2016

DECISION

Petitioner, Gerald W. Jones, is excluded from participation 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 20, 2015. Petitioner's exclusion for the 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]

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated August 31, 2015, that he 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)(1) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based on his conviction

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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.

in the Superior Court of the State of Delaware, New Castle County, 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 (RFH) on October 30, 2015. The case was assigned to me on November 4, 2015, for hearing and decision. A prehearing telephone conference was convened on November 19, 2015. The substance of the conference is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated November 19, 2015 (Prehearing Order). Petitioner did not waive an oral hearing during the prehearing conference. The I.G. requested to file a motion for summary judgment and I set a briefing schedule.

The I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) on January 4, 2016, with I.G. Exs. 1 through 8. Petitioner filed a response to the I.G. motion (P. Response) on February 17, 2016, with no exhibits. The I.G. filed a reply brief on March 3, 2016. Petitioner did not object to my consideration of I.G. exhibits 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).

The Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of a felony or misdemeanor criminal offense related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1). The Secretary has promulgated regulations implementing these provisions 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: (1) 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; (2) there is a finding of guilt in a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction has been withheld. 42 U.S.C. § 1320a-7(i)(1)-(4); 42 C.F.R. § 1001.2.

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[2] References are to the 2014 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

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 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 Petitioner from participation in Medicare, Medicaid, and all federal health care programs; and
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> Whether the length of the proposed period of 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 the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2).

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.

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

Petitioner has not waived an oral hearing and the I.G. has moved for summary judgment. 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 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).

Summary judgment is appropriate in this case. As discussed hereafter, Petitioner does not identify any genuine dispute as to a material fact necessary to establish a basis for his exclusion; to rebut the I.G.'s prima facie case; or to establish an affirmative defense. The reasonableness of the period of exclusion is not at issue and is reasonable as a matter of law. I may resolve this case by applying the law to the undisputed facts.

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

Petitioner does not dispute that he was convicted of a criminal offense. Petitioner argues, however, that the offense of which he was convicted does not trigger section 1128(a)(1) of the Act. The facts are not disputed; the issue to be resolved is whether the facts trigger section 1128(a)(1), a question of law.

a. Facts

On April 14, 2015, in the Superior Court of the State of Delaware, New Castle County, Petitioner pleaded guilty to two misdemeanor counts of falsifying business records between December 30, 2010 and November 30, 2012 and February 2010 and July 19, 2012, in violation of Delaware law. Petitioner's guilty pleas were accepted and a judgment of guilty was entered. Petitioner was sentenced to unsupervised probation, to pay a fine, to pay the costs of investigation, to make a contribution to the Delaware Victim Compensation Assistance Program, to perform community service, and to pay restitution of $13,739 to Delaware Medicaid and Medical Assistance. I.G. Exs. 3, 6, 7, 8; P. Response at 4.

During the proceedings before the trial court, counsel for Petitioner, who also represents Petitioner in this proceeding stated as follows:

> MR. BALICK: Your Honor. I may take a couple of minutes longer than you might expect for a misdemeanor sentencing but I want to explain a little bit about the circumstances. I want to talk a little bit about Wes [Petitioner], I want to talk lot will bit [sic] about the impact on his career. Let me talk first about what happened here.
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> Wes [Petitioner] was working under a program called Delaware Horseman's Assistance Funds providing counseling service to employees, workers at the racetrack. He had a contract with that fund that paid him for bunch of services, some administrative, but also counseling services. The people that were seen by Wes [Petitioner], counseled by Wes [Petitioner], and for whom **Wes [Petitioner] billed Medicaid**, were all seen. **They were all Medicaid beneficiaries**. The issue in this case is that because Medicaid is the payor of last resort and because Wes [Petitioner], part of his compensation covered counseling services, there was an overlap. And under Medicaid's rules, you can't bill for services for which you have already been paid.
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> So that's what Wes [Petitioner] did. He did this for about two years before learning that he couldn't do it, at which point he stopped. **The total amount billed and paid by Medicaid during the period of time was just under $14,000, and as you heard from the agreement, Wes [Petitioner] is prepared to reimburse Medicaid for that loss.**

I.G. Ex. 8 at 9-10(emphasis added). Although counsel was not testifying under oath, his statements to the trial judge in open court in the criminal proceedings are treated as admissions of Petitioner. Counsel also had a duty of candor toward the tribunal, that is, he was prohibited from knowingly making a false statement of fact to the trial court under Rule 3.3(a) and (d) of the Delaware Lawyers' Rules of Professional Conduct. Counsel's statements on the record in open court are treated as admissions of fact that are binding upon Petitioner.

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)):
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> (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 [Medicare] or under any State health care program.

Act § 1128(a)(1)(emphasis added). 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. Section 1128(a)(1) includes no language that requires conviction of a felony offense.

Petitioner does not dispute that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)). RFH; P. Response at 3-4. Petitioner concedes that on April 14, 2015, Petitioner pleaded guilty to two misdemeanor counts of falsifying business records; his guilty pleas were accepted and he was found guilty based on his plea. The trial court issued a judgment of conviction and sentenced Petitioner for the offense of which he was convicted. P. Response at 4. I conclude that Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act.

The statute requires that Petitioner be excluded if he was convicted of an offense related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1). Petitioner argues before me that the offenses of which he was convicted were not program related, that is, they were not related to the delivery of an item or service under Medicare or a state health care program. RFH; P. Response. Petitioner's arguments are meritless.

Appellate panels of the Departmental Appeals Board (the Board) have long held that the statutory terms of an offense do not control whether that offense is "related to" the delivery of a health care item or service under Medicare or a state health care program for purposes of an exclusion pursuant to section 1128(a)(1) of the Act. *See, e.g., Dewayne Franzen*, DAB No. 1165 (1990) (inquiry is whether conviction is related to Medicaid fraud, not whether the petitioner was convicted of Medicaid fraud). Rather, an ALJ must examine whether there is a "common sense connection or nexus between the offense and the delivery of an item or service under the program." *Scott D. Augustine*, DAB No. 2043 at 5-6 (2006) (citations omitted). To determine whether there is such a nexus or

common-sense connection, "evidence as to the nature of an offense may be considered," including "facts upon which the conviction was predicated." *Id.* at 6-7. An ALJ may also use extrinsic evidence to "[fill] in the circumstances surrounding the events which formed the basis for the offense of which Petitioner was convicted." *Narendra M. Patel, M.D.*, DAB No. 1736 at 7 (2000).

Petitioner argues that the I.G. failed to establish by a preponderance of the evidence that Petitioner's conviction was "related to the delivery of an item or services under a Federal health care program" or a "state health care program." P. Response at 4-5. Petitioner argues that summary judgment is not appropriate because there remains a genuine dispute as to whether Petitioner conviction was for an offense related to the delivery of a health care item or service under the Delaware Medicaid program. P. Response at 5.

The I.G. has presented the transcript of the criminal court proceedings during which Petitioner's counsel admitted that Petitioner's offenses were related to the Delaware Medicaid program. I.G. Ex. 8 at 9-10. The transcript is credible and weighty evidence and sufficient to establish that it is more likely than not that Petitioner's offenses were related to the Delaware Medicaid program. Petitioner asserts and argues, however, that the references to Medicaid by his counsel during the plea colloquy before the trial court were "careless shorthand for Medicaid Managed Care Organization." P. Response at 6. Petitioner asserts that in making the statement set forth above to the trial court, counsel did not believe that the claims involved were billed and paid by Medicaid, rather they were filed with and paid by "private entities acting as managed care organizations." P. Response at 6. Petitioner cannot defeat an adequately supported motion for summary judgment – which the I.G.'s motion is – by relying upon mere assertions. The I.G. has presented credible and weighty evidence, actually Petitioner's admissions in open court by his counsel, that show the nexus between Petitioner's offenses and Delaware Medicaid. Therefore, the burden is upon Petitioner to present some credible evidence, not mere assertions, to show that there is a genuine dispute as to whether the managed care organization Petitioner asserts were involved, were related to or administering the Delaware Medicaid program. Petitioner has offered no evidence to support the implication of his argument that the "managed care organizations" to which he refers in his response were not administering the Medicaid program for the State of Delaware. The phrase "state health care program" as used in section 1128(a)(1) of the Act, includes a state program approved under title XIX of the Act, which includes state Medicaid programs. Act § 1128(h). Medicaid specifically provides for the use of Medicaid managed care organizations and there is a nexus or common sense connection between Medicaid and the managed care organizations that states are authorized to use on a contractual basis in administering state Medicaid funds. Act § 1903(m), 1932.

The I.G. also presented evidence that Petitioner agreed to pay restitution to the Delaware Medicaid program. I.G. Ex. 7 at 1; I.G. Ex. 8 at 4. Petitioner argues that the Delaware Attorney General insisted upon that provision as part of the plea agreement without

explanation for why restitution should be made to Delaware Medicaid. P. Response at 6. Petitioner argues that he assumed that the restitution would be distributed to the appropriate parties. P. Response at 6. The fact that Petitioner agreed to pay restitution to the Delaware Medicaid program is good evidence that there was a nexus between Delaware Medicaid and Petitioner's offenses. Petitioner does not by mere assertions show the existence of a genuine dispute that Delaware Medicaid was entitled to the restitution, even if I accept as true that Petitioner's claims were filed with and paid by "Medicaid Managed Care Organizations" as alleged by Petitioner in his brief. P. Response at 6. Petitioner has failed to offer an affidavit, declaration, or other evidence that the Medicaid Managed Care Organizations were not administering the Delaware Medicaid program as authorized by section 1932 of the Act.

Petitioner's reliance upon the decision in *Catherine L. Dodd, R.N.*, DAB CR814 (1992), *aff'd*, DAB No. 1345 (1992), is misplaced. P. Response at 8-9. In *Dodd* the I.G. lost due to the absence of evidence that Dodd's conviction was for an offense that was related to any Medicare or Medicaid-entitled individual or that otherwise affected either program. In this case, Petitioner admitted through counsel during the criminal trial and again before me that his offenses related to Medicaid beneficiaries and Medicaid Managed Care Organizations. I.G. Ex. 8 at 9-10; P. Response.

The two essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are satisfied in this case and there is no showing of a genuine dispute of material fact. Petitioner was convicted of a misdemeanor criminal offense and the conduct that formed the basis of his conviction was related to the delivery of a health care item or service under the Delaware Medicaid program. Accordingly, I conclude that there is a basis for Petitioner's exclusion. I further conclude that exclusion is mandated by section 1128(a)(1) of the Act.

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.

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.

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 federal health care programs for the minimum statutory period of five years, effective September 20, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge