Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Dawn Patricia Tamagni
(O.I. File No. H-14-4-2942-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-3050

Decision No. CR4609

Date: May 16, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services notified Dawn Patricia Tamagni (Ms. Tamagni or Petitioner), a California licensed nurse practitioner, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years under 42 U.S.C. § 1320a-7(a)(1) based on her criminal conviction in California of prescribing controlled substances to patients without the proper state certification/furnishing number to do so. Petitioner requested a hearing to dispute the exclusion, arguing that she unwittingly prescribed medications without state authorization based on a paperwork mishap related to her state certification and because the United States Drug Enforcement Administration (DEA) had issued her a number to dispense controlled substances. Because a California court convicted Ms. Tamagni of prescribing controlled substances during the month of December 2013 without proper authorization from California authorities, and the IG proved that Ms. Tamagni prescribed a controlled substance for at least one Medicaid beneficiary in December 2013 and Medicaid paid for that prescription, I conclude that Ms. Tamagni was convicted of a criminal offense that was related to the delivery of items or services under the Medicaid program. Therefore, I affirm the IG's exclusion under 42 U.S.C. § 1320a-7(a)(1).

I. Background and Procedural History

In 1987, Ms. Tamagni received an Associate Degree in nursing and the California Board of Registered Nursing (Nursing Board) licensed her to practice as a Registered Nurse. Petitioner Exhibit (P. Ex.) 2 ¶ 3; P. Ex. 3 at 2; P. Ex. 5 at 5. Later, Ms. Tamagni earned a Bachelor Degree in nursing and a Master of Science in nursing, and completed a Family Nurse Practitioner Postgraduate Course. P. Ex. 2 ¶ 3; P. Ex. 3 at 2. In 2001, the Nursing Board issued a Nurse Practitioner Certificate to Ms. Tamagni. P. Ex. 5 at 5. In 2002, Ms. Tamagni received a DEA number to prescribe medications. P. Ex. 2 ¶ 5.

From 2001 until present, Ms. Tamagni held various nurse practitioner positions, most recently at the Anderson Walk-In Medical Clinic starting in 2012. P. Ex. 3 at 1. However, during that time, Petitioner did not have a Nursing Board furnishing number in order to prescribe medications. Hearing Transcript (Tr.) 36-37, 40. The DEA mistakenly issued a number to prescribe controlled substances to Petitioner even though she did not have the state certification. Tr. 37-38; P. Ex. 2 ¶ 9. It was not until November 2013 that the DEA determined that Ms. Tamagni was missing the state certification. P. Ex. 2 ¶ 6. At that point, Ms. Tamagni attempted to obtain a furnishing number. P. Ex. 2 ¶ 13. Ms. Tamagni also continued to prescribe medications in December 2013, was criminally charged with doing so, and pled no contest to a misdemeanor version of the charge. IG Exhibits (Exs.) 2, 6-9, 12, 13; P. Ex. 5.

In an April 30, 2015 notice, the IG informed Ms. Tamagni that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for five years. The IG indicated that the legal basis for the exclusion was 42 U.S.C. § 1320a-7(a)(1). The IG stated that he was taking this action based on Ms. Tamagni's conviction in the Superior Court of California (Superior Court), County of Shasta, of a criminal offense related to the delivery of an item or service under the Medicare or a state health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program. IG Ex. 1.

On June 25, 2015, Petitioner, through counsel, timely requested a hearing before an Administrative Law Judge (ALJ). Petitioner asserted in her hearing request that there is no basis for exclusion because her misdemeanor conviction for prescribing medications without a state certification was due to a paperwork error. Petitioner argued that because she had a valid prescription number from the DEA, she believed she was authorized to prescribe medications and did not intentionally violate California law. Petitioner also pointed out that all of her patients received proper care and that the Superior Court and the Nursing Board each only imposed probation on her for her offense. Petitioner also asserted that the exclusion should not take effect until an ALJ heard and decided this case.

On August 5, 2015, I held a prehearing conference by telephone, the substance of which is summarized in my August 6, 2015 Order and Schedule for Filing Briefs and Documentary Evidence (Order). During the conference, I explained that I do not have any authority to delay the effective date of the exclusion. Order ¶ 1; 42 U.S.C. § 1320a-7(a)(7), (c)(1); 42 C.F.R. §§ 1001.2002(b); 1005.4(c)(1), (4).

In accordance with the Order, the IG filed a brief (IG Br.) and 13 exhibits (IG Exs. 1-13). Petitioner then filed a brief (P. Br.) with seven exhibits (P. Exs. 1-7). The IG filed a reply brief (IG Reply) and objected to P. Exs. 4, 6, and 7 as irrelevant. Because Petitioner did not object to any of the IG's exhibits, I admitted them all into the record. Tr. 12; Order ¶ 9; Civil Remedies Division Procedures § 14(e). Petitioner did not dispute the IG's objections to her exhibits; therefore, I admitted P. Exs. 1 through 3 and 5, but excluded P. Exs. 4, 6, and 7. Tr. 12-13.

In his reply brief, the IG requested that I issue a decision on the written record in this case. IG Reply at 7. However, the IG also submitted written direct testimony for two witnesses, Special Agent Ross Martin of the California Department of Justice's Bureau of Medi-Cal Fraud and Elder Abuse (IG Ex. 2) and Jeannette Peralta, an investigations analyst with the IG's office (IG Ex. 10). Further, the IG stated that he offered the declarations pursuant to 42 C.F.R. § 1005.16 (IG Br. at 9), which authorizes witness testimony in written form so long as the opposing party has the opportunity to cross-examine the witness. Petitioner requested to cross-examine both of the IG's witnesses (P. Br. at 7); therefore, I denied the IG's motion for a decision on the written record and scheduled a telephonic hearing for January 29, 2016. Order Scheduling Hearing at 1-2.

Ms. Tamagni requested to testify at the hearing, and she also wanted two witnesses to testify as to a mistake that the DEA had allegedly made related to authorizing Ms. Tamagni to prescribe medications. P. Br. at 7. Although Ms. Tamagni submitted a declaration (P. Ex. 2), I permitted her to testify on direct examination at the hearing. Order Scheduling Hearing at 2. The IG objected to the testimony of Petitioner's other witnesses as potentially only providing irrelevant testimony (i.e., testimony that would only serve as a basis for making impermissible collateral attacks on Ms. Tamagni's criminal conviction). IG Reply at 7. I agreed with the IG and excluded those witnesses from the hearing. Order Scheduling Hearing at 2.

On January 29, 2016, I held a hearing in this case by telephone at which both of the IG's witnesses and Ms. Tamagni testified. Following receipt of the transcript of the hearing, both the IG and Petitioner filed post-hearing briefs (IG Post-Hearing Br. and P. Post-Hearing Br.) and reply briefs (IG Post-Hearing Reply and P. Post-Hearing Reply).

II. Issue

Does the IG have a basis to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for five years under 42 U.S.C. § 1320a-7(a)(1).

III. Jurisdiction

I have jurisdiction to decide this case. 42 U.S.C. § 1320a-7(f); 42 C.F.R. §§ 1001.2007(a)(1)-(2), 1005.2.

IV. Findings of Fact, Conclusions of Law, and Analysis[1]

The IG indicated that 42 U.S.C. § 1320a-7(a)(1) was the basis for Petitioner's mandatory exclusion. IG Ex. 1. 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 1320a–7b(f) of this title):
>
> > (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 subchapter XVIII of this chapter or under any State health care program.

Thus, the elements the IG must prove to sustain Petitioner's exclusion pursuant to section 1320a-7(a)(1) in this case are: (1) Petitioner was convicted of a criminal offense, and (2) Petitioner's offense was related to the delivery of an item or service under Medicare or a state health care program.

A. Petitioner pled nolo contendere to one count of prescribing controlled substances from on or about December 1, 2013, to on or about December 31, 2013, without valid certification or authority in violation of California Business and Professions Code § 2052(a), and the Superior Court sentenced Petitioner to community release for 12 months and 40 hours of community service.

[1] My findings of fact and conclusions of law are set forth in italics and bold font.

On July 23, 2014, the California Attorney General filed a six-count felony complaint against Petitioner with the Superior Court. IG Ex. 12. Although Petitioner initially pled not guilty to the charges, in October 2014 Petitioner pled nolo contendere to Count 2 of the complaint, which had been revised down to a misdemeanor. IG Ex. 13 at 1. Count 2 of the complaint provided:

> **[Bus. & Prof. Code § 2052, subd. (a) – a Felony]**
> **Practicing Medicine without Certification – 16 months, 2 or 3 years**
>
> From on or about December 1, 2013, to on or about December 31, 2013, defendant DAWN TAMAGNI, did violate this section by unlawfully prescribing controlled substances without valid certification or authority, in violation of section 2052, subdivision (a) of the Business and Professions Code, a felony.

IG Ex. 12 at 2 (emphasis in original). The Superior Court sentenced Petitioner to 12 months of community release and 40 hours of community service. IG Ex. 13 at 2.

B. Petitioner was convicted of a criminal offense for the purposes of 42 U.S.C. § 1320a-7(a)(1).

Under 42 U.S.C. § 1320a-7(a)(1), Petitioner must be "convicted of a criminal offense" before she can be excluded. An individual is considered "convicted" when a judgment of conviction has been entered by a federal, state, or local court, or a plea of guilty or no contest has been accepted in a federal, state, or local court. 42 U.S.C. § 1320a-7(i)(1), (3). In the present matter, Petitioner entered a no contest plea to a misdemeanor violation of California Business and Professions Code § 2052(a) and, based on that plea, the Superior Court issued a judgment and sentence. IG Ex. 13. Petitioner admits that she was convicted of a criminal offense. P. Br. at 1. Therefore, I conclude that Petitioner was convicted of a criminal offense for purposes of 42 U.S.C. § 1320a-7(a)(1).

C. Petitioner's criminal offense of prescribing controlled substances without valid California state certification or authority is an offense related to the delivery of an item or service under Medicaid.

An individual must be excluded from participation in any federal health care program if the individual was 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. 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R § 1001.101(a). A state health care program includes a state's Medicaid program. 42 U.S.C. § 1320a-7(h)(1); 42 C.F.R. § 1001.2 (definition of *State health care program*). Medi-Cal is California's Medicaid program. *See Jesusa N.*

Romero, M.D., DAB CR380, at 1 n.1 (1995); IG Ex. 3. It is significant that the term "related to" in 42 U.S.C. § 1320a-7(a)(1) simply means that there must be a nexus or common sense connection. *See Quayum v. U.S. Dep't of Health and Human Servs.*, 34 F.Supp.2d 141, 143 (E.D.N.Y. 1998); *see also Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "relating to" in another part of section 1320a-7 as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation") (internal quotes omitted).

The IG argues that Petitioner's conviction for prescribing medications without the proper state certification in December 2013 is "related to" the delivery of an item or service under Medicare or a state health care program (i.e., Medicaid) because the clinic Petitioner worked for in 2013 mostly treated Medicare and Medicaid patients, and Petitioner prescribed a medication for a Medi-Cal beneficiary on December 18, 2013, and Medi-Cal paid for that prescription. Petitioner disputes that these are sufficient reasons to connect her conviction to the Medicare or Medicaid programs. For the reason stated below, I agree with the IG that he has shown a sufficient nexus between Petitioner's conviction and the delivery of an item or service under the Medicaid program.

The IG asserts that I should infer Petitioner illegally prescribed medications to Medicare and Medicaid beneficiaries because, allegedly, 80 percent of the patients at the Anderson Walk-In Medical Clinic (i.e., the clinic Petitioner worked for from 2012 to 2014) were Medicare and Medi-Cal beneficiaries. IG Reply at 5; IG Ex. 11. IG employee Jeannette Peralta testified that she sent a request for information to the Anderson Walk-In Medical Clinic and that the clinic responded with dates of Petitioner's employment and the percentages of Medicare and Medi-Cal beneficiaries seen at the clinic. IG Ex. 10 ¶ 3. On cross-examination, Ms. Peralta admitted that she did not make a "specific inquiry about the percentage or proportion of patients treated by [Petitioner]." Tr. 31.

I reject the IG's argument that I should infer Petitioner prescribed medications for Medicare and Medi-Cal beneficiaries. The document on which the IG's argument is based was completed by an unknown individual about an unnamed clinic. *See* IG Ex. 11. Further, assuming the unnamed clinic is where Petitioner worked, this document lacks specific information about Petitioner's patients. In sum, the IG's evidence is insufficient.

The IG also asserts that Petitioner's crime of prescribing controlled substances to patients in December 2013 without a valid state certification from the Nursing Board is related to the Medicaid program because Petitioner prescribed a controlled substance to a Medi-Cal beneficiary referred to as A.P. on December 18, 2013, and the prescription was paid by the Medicaid program. IG Br. at 6. As the IG points out, Petitioner admitted to this. IG Reply at 4; P. Br. at 3 ("[O]ne of Ms. Tamagni's patients, referred to in the I.G.'s brief as 'A.P.', was a Medicaid recipient to whom Ms. Tamagni prescribed the controlled substance of Norco."); P. Ex. 2 ¶ 15 ("The patient identified in the I.G.'s brief and

exhibits as 'A.P.' was provided excellent care by me and the staff of Anderson Walk-In Clinic. The medications prescribed were indicated, well-tolerated, and he was provided appropriate dosages, monitoring, and follow-up care.").

Petitioner was convicted of "unlawfully prescribing controlled substances without valid certification or authority" under California law. IG Ex. 12 at 2. This conclusion is based on the text of the statute under which Petitioner was convicted and on numerous statements made by Ms. Tamagni and her counsel. Hearing Request at 3-4 ("Ms. Tamagni entered a plea to a single misdemeanor count of violation of Business and Professions Code section 2052(a), which acknowledged the basic error in omission that she prescribed medications without a furnishing number."); P. Br. at 2 ("There is no dispute that Ms. Tamagni pled no contest to and was convicted of the offense of prescribing a controlled substance without a valid Nurse Practitioner's furnishing certificate."); P. Ex. 2 ¶ 13 ("I chose to admit to a single charge which factually acknowledged that I practiced as a nurse practitioner and prescribed medications without a [Nursing Board]-issued furnishing number. That was factually true and could be proven."); P. Ex. 5 at 7, 28. Further, Agent Martin testified that his investigation into Ms. Tamagni's conduct focused on December 2013 through February 2014 because during that time period, Ms. Tamagni knew that she was not authorized by the Nursing Board to prescribe medications. Tr. 42. This investigation was the basis for the criminal complaint filed against Ms. Tamagni. IG Ex. 2 ¶ 13-15; Tr. 46-47.

I conclude that the charge to which Ms. Tamagni pled no contest, i.e., unlawfully prescribing controlled substances without authorization during December 2013, is related to the Norco (Hydrocodone/Acetaminophen) prescription she wrote for Medi-Cal beneficiary A.P. on December 18, 2013. Agent Martin testified that the DEA referred Ms. Tamagni's conduct to his office for investigation. Tr. 34. During his investigation, Agent Martin accessed the California Department of Justice's Controlled Substance Utilization Review and Evaluation System and testified that the number "0" in the column titled "refills" means that the prescription was an original prescription and not a refill. Tr. 44-45; IG Ex. 2 ¶ 5; IG Ex. 7. Agent Martin then conducted additional investigative work to verify the prescriptions from the database he accessed. Tr. 46-47; IG Ex. 2 ¶ 7. In regard to patient A.P., Agent Martin testified that he located the December 18, 2013 Norco prescription for A.P. that bears Ms. Tamagni's stamped signature. IG Ex. 2 ¶ 8; IG Ex. 6. Agent Martin also confirmed that patient A.P. was a Medi-Cal beneficiary, that A.P. filled the prescription at a Rite Aid on December 18, 2013, and that Medi-Cal paid for the prescription. IG Ex. 2 ¶¶ 10-12; IG Exs. 7-9; *see also* Tr. 64-66. I found Agent Martin's testimony to be credible based on its consistency with the record and because he answered questions from the parties without evasion.

Contrary to the position that Petitioner took in her prehearing brief and written direct testimony, Petitioner testified during the hearing that she ceased prescribing medications in November 2013 when the human resources department of the Anderson Walk-In

Medical Clinic told her that she did not have a Nursing Board's furnishing number; however, she also did not withdraw or pull back any previously issued prescription that had refills. Tr. 77-78, 89-90, 96-97. Petitioner also indicated that her stamped signature on the December 18, 2013 prescription for A.P. could have been stamped by another person. Tr. 99-100. However, Petitioner also testified that she did not recall if she issued the December 18, 2013 prescription to A.P. Tr. 101. In regard to the criminal plea, Petitioner testified that she only admitted to practicing without a Nursing Board furnishing number and that her plea did not specifically encompass patient A.P. Tr. 81-85, 92, 95-96. However, on cross-examination, the IG confronted Petitioner with her settlement agreement in her Nursing Board disciplinary case in which she admitted to a charge stating that her criminal conviction was based in part on prescribing 60 tablets of Norco (10 mg./325 mg.) for a patient on December 18, 2013. Tr. 108-12; P. Ex. 5 at 7, 27-28. This is exactly what Petitioner prescribed for patient A.P. IG Exs. 6, 7, 9.

I consider Petitioner's credibility to have been compromised during the hearing in this case. Prior to the hearing, Petitioner indicated that she was convicted of prescribing medications without proper authorization. However, Petitioner altered her position to stating that she was simply practicing without authorization. Petitioner testified that she did not prescribe medications after November 2013, but then stated she did not recall whether she had. This assertion is contradicted by the charge to which she pled no contest and the settlement agreement she entered into with the Nursing Board. Finally, even if Petitioner's testimony is accurate, I am not able to accept Petitioner's attempt to change the factual basis for her plea because I am precluded from reconsidering the basis for the criminal conviction in her case. 42 C.F.R. § 1001.2007(d).

Therefore, I conclude that the evidence of record shows a sufficient nexus between Petitioner's criminal conviction for prescribing medication without proper state certification and the Medicaid program because Petitioner's conviction was based in part on a prescription Petitioner gave to patient A.P., a Medi-Cal beneficiary who filled the prescription using Medi-Cal to pay for it.

D. Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B).

Because I have concluded that a basis exists to exclude Petitioner under 42 U.S.C. § 1320a-7(a)(1), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

V. Conclusion

I affirm the IG's determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for the statutory five-year minimum period under 42 U.S.C. § 1320a-7(a)(1), (c)(3)(B).

/s/
Scott Anderson
Administrative Law Judge