Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Joanne Parkhurst
(OI File No. H-15-4-2871-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-352

Decision No. CR4647

Date: June 27, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Joanne Parkhurst, from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(2) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(2)) for a period of five years. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner, and an exclusion for the minimum period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background

In a letter dated December 31, 2015, the IG excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Act (42 U.S.C. § 1320a-7b(f)) for a minimum period of 5 years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1. The IG explained that Petitioner's exclusion was based on a "conviction as defined in section 1128(i) (42 U.S.C. [§] 1320a-7(i)), in the Fulton City Court, Oswego County, of the State of New York, of a criminal offense related to neglect or abuse of patients, in connection with the delivery of a health

care item or service, including any offense that the Office of Inspector General (OIG) concludes entailed, or resulted in, neglect or abuse of patients . . . ." IG Ex. 1 at 1. The IG explained Petitioner was excluded pursuant to section 1128(a)(2) of the Act, which mandates the exclusion of any individual who is convicted under federal or state law of a criminal offense related to the neglect or abuse of patients while in connection with the delivery of a health care item or service. The IG informed Petitioner that the exclusion was for the "minimum statutory period of five years." IG Ex. 1 at 1; *see* 42 U.S.C. § 1320a-7(c)(3)(B).

Petitioner, through counsel, submitted a timely request for hearing that was dated February 24, 2016, and received on February 25, 2016. On March 23, 2016, pursuant to 42 C.F.R. § 1005.6, I presided over a telephonic pre-hearing conference, and on March 24, 2016, I issued an Order and Schedule for Filing Briefs and Documentary Evidence (Order).

Pursuant to my Order, the IG filed an informal brief (IG Br.) and a reply brief, along with six exhibits (IG Exs. 1-6). Petitioner filed an informal brief (P. Br.) and twelve exhibits (P. Exs. 1-12). I admit the parties' submissions and exhibits into the record. Neither party requested that I convene a hearing in person, and I am therefore deciding this case based on the parties' written filings.

II. Issue

The issue in this case is whether there is a legal basis under section 1128(a)(2) of the Act for the IG to exclude Petitioner from participation in Medicare, Medicaid, and other federal health care programs. If I find a legitimate basis for the exclusion, I am required to uphold the mandatory five-year exclusion.

III. Jurisdiction

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

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

1. ***Petitioner was convicted of endangering the welfare of an incompetent or physically disabled person, which is an offense, pursuant to section 1128(a)(2) of the Act, that subjects her to a mandatory exclusion from all federal health care programs for a minimum of five years.***

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

Section 1128(a)(2) requires a mandatory exclusion from all federal health care programs under certain conditions. Section 1128(a)(2) states:

> (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.

42 U.S.C. § 1320a-7(a)(2).

The IG argues that Petitioner was properly excluded from all federal health care programs based on a conviction for an offense related to patient abuse in connection with the delivery of a health care item or service. IG Br. at 3-4. Petitioner, in her informal brief, concedes that "the Inspector General is within its authority to impose the minimum mandatory five-year exclusion." P. Br. at 1. However, Petitioner states that she is "asking for the exercise of some discretion in setting the effective date of the exclusion." P. Br. at 2. As explained below, I find that Petitioner was convicted of a criminal offense, for purposes of the Act, that mandates exclusion from all federal health care programs effective January 20, 2016.

On or about March 12, 2013, the State of New York charged in a misdemeanor information that Petitioner committed four counts of endangering the welfare of an incompetent or physically disabled person pursuant to New York State Penal Law § 260.25. The information detailed that Petitioner was "employed as a private-duty Medicaid Nurse" and that on four separate occasions in 2012, she "knowingly acted in a manner likely to be injurious to the physical, mental or moral welfare of a person who is unable to care for himself because of physical disability . . . ." IG Ex. 4 at 1. Specifically, on those four occasions in 2012, Petitioner "was incapable of rendering medical care" to the disabled patient due to her own alcohol intoxication. IG Ex. 4 at 1-2. The information charged that on July 25, 2012, Petitioner consumed a third of a bottle of wine, two 8-ounce glasses of mint schnapps mixed with half and half, and a half bottle of Jägermeister mixed with soda. IG Ex. 4 at 2. The information stated that on that occasion, Petitioner left a disabled patient slouched in a forward position in his

wheelchair while she crawled into the patient's bed and "laughed and laid down for 25 to 30 minutes." [2] IG Ex. 4 at 2. On April 10, 2014, Petitioner pleaded guilty to one count of endangering the welfare of an incompetent or physically disabled person. IG Ex. 3 at 6; IG Ex. 6 at 2. At the time of her guilty plea, the judge explained that if she completed her probation requirements, she would be permitted to withdraw her guilty plea at a later date. IG Ex. 3 at 8. Petitioner was placed on interim probation and paid restitution in the amount of $2,054.85. IG Ex. 6 at 2; *see* IG Ex. 5 at 1.

On May 28, 2015, Petitioner withdrew her guilty plea to the offense of endangering the welfare of an incompetent or physically disabled person (IG Ex. 6 at 1), and entered a plea of guilty to a single count of disorderly conduct pursuant to New York State Penal Code § 240.20. IG Ex. 5; IG Ex. 6 at 1.

I find that Petitioner has a conviction for a criminal offense relating to the neglect or abuse of a patient in connection with the delivery of a health care item or service. Pursuant to section 1128(i)(3) of the Act, she is considered to have been convicted of a criminal offense "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court." 42 U.S.C. § 1320a-7(i)(3). Section 1128(i)(4) of the Act states that an individual has been convicted of a criminal offense "when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." 42 U.S.C. § 1320a-7(i)(4). On April 10, 2014, Petitioner entered a plea of guilty to the offense of endangering the welfare of an incompetent or physically disabled person who was under her care while she was working as a private-duty licensed practical nurse. A Fulton City Court judge accepted Petitioner's guilty plea to the offense of endangering the welfare of an incompetent or physically disabled person. IG Ex. 3 at 7. Even though Petitioner later withdrew her guilty plea and pleaded guilty to a reduced charge of disorderly conduct after she completed more than a year of probation, the IG correctly determined that a judge accepted the guilty plea to the offense of endangering the welfare of an incompetent or disabled person and that Petitioner has a conviction pursuant to 42 U.S.C. § 1320a-7(i)(3).

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[2] The information reports that when the patient is seated in the forward position in his wheelchair, he has difficulty speaking and saying if something is wrong and that he cannot move his head on his own when it is tipped forward. IG Ex. 4 at 2. Petitioner acknowledged that this patient "needs constant supervision from his nurses, especially at night" and that "[t]he care givers need to be responsive at all times in case [the patient's] breathing becomes compromised." IG Ex. 4 at 13. Petitioner asserted that she would not consume more than two drinks while caring for the patient and that she would normally feel a "buzz" from alcohol after consuming two drinks. IG Ex. 4 at 13.

Congress, through enactment of the Social Security Act, has determined that an individual who has been convicted of an offense relating to the abuse of a patient in connection with the delivery of a health care item or service *must* be excluded from federal health care programs for no less than five years, and it has afforded neither the IG nor an administrative law judge (ALJ) the discretion to impose an exclusion of a shorter duration. 42 U.S.C. § 1320a-7(c)(3)(B). Even if I were so inclined, I cannot shorten the length of the exclusion because I do not have authority to "find invalid or refuse to follow Federal statutes or regulations." 42 C.F.R. § 1005.4(c)(1). I therefore agree with the IG and Petitioner that an exclusion for a minimum period of five years is mandated.

2. The effective date of Petitioner's exclusion is January 20, 2016.

While Petitioner has conceded that a five-year exclusion is mandated, she asks that I exercise discretion in "setting the effective date of the exclusion." P. Br. at 2. In support of this request, Petitioner submitted a copy of a January 13, 2014 letter that her attorney sent to the New York Attorney General's Medicaid Fraud Control Unit in which he argued that a criminal conviction of Petitioner would not be appropriate under the circumstances. P. Ex. 1. Petitioner's attorney submitted numerous letters from family and friends in support of his request. P. Ex. 1; *see* P. Exs. 3-12. Petitioner's counsel also submitted a letter from a clinical supervisor at the intensive outpatient alcohol treatment program that Petitioner completed. P. Ex. 2.

The Departmental Appeals Board (Board) has explained that an ALJ does not have the authority to alter the effective date of an exclusion. *Lisa Alice Gantt*, DAB No. 2065 at 2-3 (2007). In addressing the effective date of an exclusion, the Board has stated the following:

> The Board has repeatedly held that the applicable statute and regulations give an ALJ no authority to adjust the beginning date of an exclusion by applying it retroactively. Thomas Edward Musial, DAB No. 1991, at 4-5 (2005), citing Douglas Schram, R.Ph., DAB No. 1372, at 11 (1992) ("Neither the ALJ nor this Board may change the beginning date of Petitioner's Exclusion."); David D. DeFries, DAB No. 1317, at 6 (1992) ("The ALJ cannot . . . decide when [the exclusion] is to begin."); Richard D. Phillips, DAB No. 1279 (1991) (An ALJ does not have "discretion . . . to adjust the effective date of an exclusion, which is set by regulation."); Samuel W. Chang, M.D., DAB No. 1198, at 10 (1990) ("The ALJ has no power to change . . . [an exclusion's] beginning date."). In Schram, we held that this lack of discretion extends to the Board as well as the ALJs, and we reiterated that holding in Musial.

Gantt, DAB No. 2065 at 2-3 (footnote omitted). The effective date of the exclusion, January 20, 2016, is established by regulation, and I am therefore bound by the effective date imposed by the IG. 42 C.F.R. §§ 1001.2002(b); 1005.4(c)(1).

V. Conclusion

For the foregoing reasons, I affirm the IG's decision to exclude Petitioner from participation in Medicare, Medicaid, and all l health care programs for a minimum period of five years, effective January 20, 2016.

/s/
Leslie C. Rogall
Administrative Law Judge