Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Tamara Rene Taylor
(OI File No. H-15-4-42431-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-430

Decision No. CR4671

Date: August 4, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Tamara Rene Taylor, from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) for a minimum period of five years. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner, and that 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 January 29, 2016, 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 Court of Common Pleas, Franklin County, Ohio, 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 at 1. The IG explained Petitioner was excluded pursuant to section 1128(a)(1) 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 delivery of an item or service under Medicare or any state health care program. 42 U.S.C. § 1320a-7(a)(1). The IG informed Petitioner that the exclusion was for "the minimum statutory period of 5 years." IG Ex. 1 at 1; *see* 42 U.S.C. § 1320a-7(c)(3)(B).

Petitioner submitted a timely request for hearing that was dated March 7, 2016, and received on March 25, 2016. On April 20, 2016, pursuant to 42 C.F.R. § 1005.6, I presided over a telephonic pre-hearing conference, and that same day 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 five exhibits (IG Exs. 1-5). Petitioner failed to file a timely informal brief, and after showing good cause for her late filing in response to a June 30, 2016 Order to Show Cause, Petitioner filed an informal brief (P. Br.) and one exhibit (P. Ex. 1). I admit the parties' submissions and exhibits into the record.

Petitioner has requested a live hearing for the sole purpose of permitting her to "[t]estify as to the date she was first excluded in Ohio." P. Br. at 3. Petitioner alleged in her brief that she was excluded by the State of Ohio for a period of five years, effective June 24, 2014. I observe that the State of Ohio publicly reports that Petitioner was excluded on June 17, 2014, and that her exclusion was added to the public listing on June 24, 2014. Ohio Medicaid Provider Exclusion and Suspension List, *http://www.medicaid.ohio.gov/PROVIDERS/EnrollmentandSupport/ProviderExclusionandSuspensionList.aspx*, last visited August 1, 2016. Testimony is therefore unnecessary to establish the date of Petitioner's exclusion from the Ohio Medicaid program. Furthermore, as I will explain below, the date of Petitioner's exclusion by the State of Ohio has no relevance to the instant exclusion. A hearing is unnecessary and I will decide this case based on the written submissions and documentary evidence. *See* Order § V.

II. Issue

The issue in this case is whether there is a legal basis under section 1128(a)(1) 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 exclusion for a minimum of five-years.

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 an offense related to the delivery of a health care item or service under a state Medicaid program, which is an offense, pursuant to section 1128(a)(1) of the Act, that subjects her to a mandatory exclusion from all federal health care programs for a minimum of five years.

Section 1128(a)(1) requires a mandatory exclusion from all federal health care programs under certain conditions. Section 1128(a)(1) 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)):
>
> > (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 any State health care program.

See 42 U.S.C. § 1320a-7(a)(1).

The IG argues that Petitioner was properly excluded from all federal health care programs based on a conviction for an offense that was related to the delivery of a health care item or service under the Ohio Medicaid program. IG Br. at 4-6. Petitioner, who is represented by counsel, concedes in her informal brief that she was convicted of a criminal offense for which exclusion is required, stating that "[t]he focus of this appeal is not that Tamara Taylor should be excluded, but the date the exclusion should begin." P. Br. 2-3. 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 February 18, 2016.

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

On or about June 17, 2014, a grand jury in the State of Ohio returned a true bill of indictment charging that Petitioner committed three felony offenses of Medicaid Fraud, Falsification in a Theft Offense, and Complicity to Commit Theft by Deception.[2] IG Ex. 3 at 1-3. On March 12, 2015, Petitioner, with the assistance of the same counsel who currently represents her in the instant case, entered a guilty plea to the offense of Tampering with Records, in violation of Ohio Revised Code § 2913.42. IG Exs. 2 at 1, 4 at 1. On April 24, 2015, Petitioner was sentenced to 30 days of incarceration, which was suspended, and a two-year period of probation. Petitioner was also ordered to pay $2,045.08 in restitution and to fully cooperate with the State of Ohio in its investigation of other health care fraud and to testify truthfully at proceedings. IG Ex. 2 at 2. The sentencing judge acknowledged that Petitioner's guilty plea was to "the stipulated lesser included offense of Count One of the Indictment, to wit: Tampering with Records."[3] IG Ex. 2 at 1.

I find that Petitioner has been convicted of a criminal offense relating to the delivery of an item or service under the Ohio Medicaid program, a state health care program. 42 C.F.R. § 1001.2. Pursuant to section 1128(i)(3) of the Act, a petitioner 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). On March 12, 2015, Petitioner entered "a reasoned and valid Alford Plea of guilty to the stipulated lesser offense of Count One of the Indictment." IG Ex. 4 at 1; IG Ex. 2 at 1. Count One of the indictment was a charge of Medicaid fraud (IG Ex. 3 at 1-2), and Petitioner entered a plea of guilty to the offense of Tampering with Records. IG Ex. 4 at 1. The sentencing judge determined that Petitioner entered a plea of guilty to a lesser and included offense of Medicaid Fraud, which had originally been charged as a felony offense by criminal indictment. IG Exs. 2 at 1; 3 at 1-2. The IG correctly determined that Petitioner had been convicted pursuant to 42 U.S.C. § 1320a-7(i)(3), and Petitioner concedes as much in her brief. P. Br. at 3.

Congress, through enactment of the Act, determined that an individual who has been convicted of a criminal offense relating to an item or service under Medicare or a state health care program *must* be excluded from federal health care programs for no less than five years, and it 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).

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[2] The indictment stated that the offenses were in violation of Ohio Revised Code §§ 2913.40(B), 2921.13(A)(9), and 2923.03 and 2913.02(A)(3).

[3] Count One of the indictment charged that Petitioner "did knowingly make or cause to be made false or misleading statements or representations to the Ohio Department of Job and Family Services, in claims for services purportedly rendered under the Ohio Medical Assistance Program, all for use in obtaining reimbursement from the Ohio Medical Assistance Program, also known as Medicaid." IG Ex. 3 at 1.

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 February 18, 2016.

Petitioner states that "[i]t is not that she should not be excluded," but rather disputes "the date the exclusion should begin." P. Br. at 3. Petitioner further concedes that she is unsure whether "this reviewing body has jurisdiction to correct this travesty." P. Br. at 3. Petitioner argues that because she was excluded by the State of Ohio for five years, effective June 2014, and her federal exclusion began in February 2016, the total combined period of exclusion by the state and federal exclusion authorities results in an approximately 20-month period longer than five years. P. Br. at 3. Petitioner argues that her "Constitutional Rights are being violated" and that "[h]er being excluded beyond the intended 5-years of both the Ohio and Federal law amounts to double jeopardy for the additional 20 months." P. Br. at 3.

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 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, February 18, 2016, is 20 days after the date of the IG's January 29, 2016 letter and is established by regulation (42 C.F.R. § 1001.2002(b)); I am bound by that regulation. 42 C.F.R. § 1005.4(c)(1).

As I explained at the outset of the decision, 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)). The nature of this exclusion is broad, and is distinct from any exclusion imposed by the State of Ohio. While the state and federal exclusions may overlap to some extent, the "overlap between the two exclusions . . . does not mean that the exclusions themselves are the same or should be treated as such for the purposes of assignment of effective dates." *Shaikh M. Hasan, M.D.*, DAB No. 2648 at 8 (2015). The effective date of the exclusion by the State of Ohio has no bearing on the effective date of the IG exclusion. *Id.*; 42 C.F.R. § 1001.2002(b) (date of exclusion will be effective 20 days from the date of the notice); 42 C.F.R. § 1005.4(c)(1) (ALJ does not have the authority to refuse to follow federal regulations).

With respect to Petitioner's claim that she has been subject to double jeopardy and therefore her constitutional rights have been violated, the Board in the aforementioned *Hasan* decision stated that such an argument was "without merit," noting that "the courts and the Board have held that exclusions under section 1128 are civil and remedial sanctions, not criminal and punitive sanctions" and that an IG exclusion "does not subject a petitioner to double jeopardy." *Hasan*, DAB No. 2648 at 13-14; *see* U.S. Constitution, Amendment V (stating "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

V. Conclusion

For the foregoing reasons, I affirm the IG's decision to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years, effective February 18, 2016.

/s/

Leslie C. Rogall
Administrative Law Judge