Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Christina Diane Guerrero
(O.I. File No. H-10-40489-9),

Petitioner

v.

The Inspector General.

Docket No. C-12-1105

Decision No. CR2703

Date: February 6, 2013

DECISION

Petitioner, Christina Diane Guerrero, is excluded 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)), effective June 20, 2012. Petitioner is excluded because Petitioner was convicted in the Superior Court of California for failure to report abuse under California Welfare and Institutions Code § 15630(h). There is a proper basis for the exclusion. Petitioner's exclusion for the minimum period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

---

[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.

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated May 31, 2012, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(2) of the Act. The basis cited for Petitioner's exclusion was her conviction in the Superior Court of California, County of Mendocino, of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service. Act § 1128(a)(2); 42 C.F.R. § 1001.101(a). Petitioner requested a hearing pursuant to 42 C.F.R. § 1005.2, by letter dated July 5, 2012, which was received by the Civil Remedies Division on July 16, 2012. The case was assigned to me for hearing and decision on August 7, 2012. On August 29, 2012, I convened a telephonic prehearing conference, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) dated August 29, 2012. During the conference, Petitioner did not waive an oral hearing and the I.G. requested an opportunity to file a motion for summary judgment.

The I.G. filed a motion for summary judgment and supporting brief (I.G. Brief) on September 20, 2012, with I.G. Exhibits (I.G. Exs.) 1 through 7. Petitioner filed her response (P. Brief) on November 7, 2012, with several documents attached that I treat as P. Ex. 1.[2] Petitioner filed several documents with her request for hearing that were also not marked as exhibits that I treat as P. Ex. 2.[3] The I.G. filed a reply on November 28, 2012. The I.G. included eight exhibits with the I.G. Reply, marked as I.G. Exs. 1 through 8. On November 30, 2012, I declined to accept the I.G. Reply and I.G. exhibits submitted with the reply as the exhibit numbers duplicated the exhibits numbers used for

---

[2] Petitioner failed to properly mark her documents as exhibits as instructed in my August 29, 2012 Prehearing Order and the Civil Remedies Division Procedures (CRDP). Rather than return the documents to Petitioner to be correctly marked, I will refer to the documents collectively as P. Ex. 1. The documents attached to Petitioner's brief are described as follows: Letter, dated October 27, 2012, from Cammy Michel, PhD.; Order For Dismissal, dated November 6, 2012; Notice and Order re: Fees Due for Dismissal, dated November 6, 2012; Petition for Dismissal, dated October 18, 2012.

[3] The documents filed with the request for hearing that I treat as P. Ex. 2 are described as follows: Order of Summary Probation dated April 7, 2011; letter dated December 9, 2009, from John P. Jones; letter dated July 5, 2012, from Jane Dressler; letter dated September 2, 2010, from Liona Andrew; letter dated July 5, 2012, from Adam Willits; undated letter from Ashley Buonanno; undated letter from Allison Buell; letter dated June 15, 2012, from Andria Callas.

different documents marked as I.G. Exs. 1 through 7 filed with the I.G. Brief. On November 30, 2012, the I.G. filed a corrected Reply Brief (I.G. Reply) and exhibits properly marked I.G. Exs. 8 through 15. Petitioner submitted a sur-reply (P. Sur-Reply) on December 27, 2012.

No objection has been made to my consideration of I.G. Exs. 1 through 15 and they are admitted as evidence. The I.G. did not object to my consideration of the documents submitted by Petitioner with her request for hearing (P. Ex. 2) and with her response to the motion for summary judgment (P. Ex. 1). P. Ex. 1 and 2 are admitted and considered but only to the extent that they are relevant to the limited issues before me. The I.G. objects in his Reply Brief to my consideration of Petitioner's response to the motion for summary judgment on the grounds that Petitioner's response was untimely and Petitioner failed to follow established procedures to obtain an extension of the time to file or to obtain leave to file out-of-time. I.G. Reply at 1-2. The I.G.'s objection is overruled. The I.G. has articulated no prejudice to the I.G. due to Petitioner's late filing and failure to follow procedures. Petitioner's explanation for late filing is also adequate to avoid the imposition of a sanction for failure to comply with my Prehearing Order and the CRDP.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner's right to reasonable notice and an opportunity for a hearing before an administrative law judge (ALJ) and judicial review of the final action of the Secretary.

Pursuant to section 1128(a)(2) of the Act, the Secretary must exclude from participation in Medicare, Medicaid, and all federal health care programs, any individual who 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 C.F.R. § 1001.101(b). The statute does not distinguish between felony convictions and misdemeanor convictions and does not require that the health care item or service be delivered under Medicare, Medicaid, or a federal or state healthcare program. The Act defines "conviction" to include: (1) "when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged" or (2) "when there has been a finding of guilt against the individual or entity by a Federal, State, or local court" or (3) when a plea of guilty or no contest is accepted by a court or (4) when an individual enters "a first offender, deferred adjudication, or other arrangement or program where a judgment of conviction has been withheld." Act § 1128(i)(1), (2).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. The exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b). 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 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).

Petitioner bears the burden of going forward with the evidence and the burden of persuasion on any affirmative defenses or mitigating factors. The I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b), (c). The burden of persuasion is judged by a preponderance of the evidence. 42 C.F.R. §§ 1001.2007(c), 1005.15(d). Petitioner may not obtain review of, or collaterally attack on procedural or substantive grounds, a criminal conviction or civil judgment of a federal, state, or local court or another government agency that is cited in this forum as the basis for exclusion. 42 C.F.R. § 1001.2007(d).

B. Issues

The Secretary of Health and Human Services (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).

C. Conclusions of Law, Findings of Fact, and Analysis

My conclusions of law are in bold followed by my findings of fact and analysis.

1. Petitioner's request for hearing is 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.

The right to hearing before an Administrative Law Judge (ALJ) is accorded to a sanctioned party by 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 42 C.F.R. § 1005.3. 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 disputed issues 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 that, if true, would refute the facts that the moving party relied upon. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (finding in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Life Plus Ctr.*, DAB CR700 (2000); *New Millennium CMHC, Inc.*, DAB CR672 (2000).

Summary judgment is appropriate in this case. There is no dispute that Petitioner pled guilty to a misdemeanor offense of failure to report abuse in violation of California Welfare and Code Section 15630(h). I.G. Ex. 6. There is also no dispute that the Superior Court of California entered an Order of Summary Probation, accepting Petitioner's plea of guilty. I.G. Ex. 4. The facts underlying the conviction are not subject to dispute before me. There is no genuine dispute as to any material issue of fact related to the issue of whether Petitioner was convicted of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service as discussed hereafter. Whether the I.G. has authority to exclude Petitioner pursuant to 1128(a)(2) is an issue that must be resolved against Petitioner as a matter of law based upon the undisputed facts. The issue of the reasonableness of the period of exclusion must also be resolved against Petitioner as the period of exclusion is specified by section 1128(c)(3)(E) of the Act. Accordingly, summary judgment is appropriate.

3. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(2) of the Act.

The I.G. cites section 1128(a)(2) of the Act as the basis for Petitioner's exclusion. I.G. Ex. 1. Exclusion from participation in Medicare, Medicaid, and all federal health care programs is required by section 1128(a)(2) of the Act when: (1) the individual was convicted of a criminal offense under federal or state law; (2) the conviction was related to the neglect or abuse of patients; and (3) the patient neglect or abuse occurred in connection with the delivery of a health care item or service.

a. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Act.

There is no dispute that on April 7, 2011, Petitioner pled guilty to a violation of California Welfare and Institutions Code § 15630(h), Failure to Report Abuse, in the Superior Court of California for Mendocino County. I.G. Exs. 4, 6, 11, 12; P. Exs. 1, 2.

The court accepted Petitioner's plea and entered an Order of Summary Probation, sentencing Petitioner to 24 months of probation, 100 hours of community service, and restitution in the amount of $100.00. I.G. Exs. 4, 11.

Petitioner disputes that she was convicted of a criminal offense under state or federal law within the meaning of section 1128(a)(2) of the Act. Petitioner argues that her plea in the Superior Court of California for Mendocino County was made with the advice of counsel, but she was not told that she was subject to exclusion from Medicare. Petitioner claims she understood that the judgment was suspended subject to completion of two years of probation. Petitioner argues she understood that the diversion program would protect her Certified Nursing Assistant (CNA) license. She states she understood that she was obligated to complete community service, pay fees and restitution, and complete probation and her conviction would be expunged. Petitioner states that had she been aware that she could be excluded based on the conviction, she would have gone to trial or appealed the plea. She argues it is not fair for her to be excluded given the facts. Hearing Request; P. Brief. Petitioner does not disputed that she pled guilty to a violation of California Welfare and Institutions Code § 15630(h), Failure to Report Abuse, the plea was accepted, and she was sentenced. The gist of her argument is that it is unfair for her to now be excluded given that her lawyer never advised her she was subject to exclusion from Medicare. Whether or not Petitioner's legal counsel in the criminal proceeding advised Petitioner adequately is an issue between Petitioner and her counsel. When the I.G. proposes to exclude an individual based on a criminal conviction by a federal, state, or local court in which the facts were adjudicated, the basis for the conviction is not reviewable and not subject to collateral attack on substantive or procedural grounds in this proceeding. 42 C.F.R. § 1001.2007(d). Therefore, Petitioner is bound before me by the facts upon which she pled guilty in the California court. Petitioner is prohibited from obtaining review of the basis for the conviction in this forum and I have no jurisdiction to review the basis for her conviction.

Petitioner also argues that her case has subsequently been dismissed. P. Brief. Petitioner petitioned to have her criminal charge dismissed and for early termination of her probation. I.G. Exs. 12, 13, 14, 15; P. Ex. 2. The trial court subsequently ordered that Petitioner's guilty plea be set aside and vacated. I.G. Ex. 15; P. Ex. 2. However, the fact that Petitioner's probation was terminated early and the charge dismissed by the trial court does not negate Petitioner's conviction as if it had been reversed on appeal. Petitioner's plea of guilty on April 7, 2011, the court's acceptance of the plea, and the court's Order of Summary Probation satisfy the definitions of "conviction" in sections 1128(i)(1) and (i)(3) of the Act. The term "conviction" includes the acceptance of a plea, the finding of guilty, as well as deferred adjudications and similar programs where a judgment of conviction is withheld by the court. Act § 1128(i)(4). Accordingly, I conclude that Petitioner was convicted of a criminal offense under state law within the meaning of section 1128(a)(2) of the Act.

b. Petitioner's conviction was related to failure to report abuse of nursing home residents.

Petitioner does not dispute that she was convicted of failure to report the abuse of long-term care residents that occurred on November 28, 2009, while she was working as a CNA at Valley View Skilled Nursing Facility in Ukiah, California. Petitioner also does not dispute that the abuse involved patients cared for by Petitioner. Hearing Request; P. Brief. Thus, there is no genuine dispute that Petitioner's conviction was related to abuse of patients under her care. *Narendra M. Patel*, DAB No. 1736, at 8 (2000); *Bruce Lindberg, D.C.*, DAB No. 1280 (1991).

c. Petitioner's failure to report abuse of nursing home residents occurred in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

On April 7, 2011, Petitioner pled guilty to a misdemeanor offense of failure to report abuse in violation of California Welfare and Institutions Code Section 15630(h), under which a person who has assumed full or intermittent responsibility of an elder or dependent adult must report knowledge of any incident that appears to be physical abuse. I.G. Ex. 4; California Welfare and Institutions Code § 15630(a), (b), (h). The underlying complaint states that on November 28, 2009, while working at the Valley View Skilled Nursing Facility, Petitioner and five other CNA's conspired to apply excessive amounts of A & D ointment over the bodies of nursing home patients without authorization, as a prank against another CNA. I.G. Ex. 3. Petitioner, by her plea of guilty admitted that she failed to report this incident of elder abuse to the appropriate authorities. I.G. Ex. 7. The Bureau of Medi-Cal Fraud and Elder Abuse reported the conviction to the I.G. I.G. Ex. 7.

Petitioner's conviction was clearly in connection with the delivery of a health care service given her status as a CNA at the Valley View Skilled Nursing Facility at the time, the fact she was caring for residents, and her failure to report abuse of her residents by other CNAs and herself. The nexus is apparent as Petitioner had access to the residents as a healthcare provider and she failed to report the abuse of her residents. Accordingly, I conclude that there is a basis for Petitioner's exclusion, and her exclusion is mandated by section 1128(a)(2) of the Act. The elements of section 1128(a)(2) are satisfied, and I have no discretion not to exclude Petitioner.

4. Pursuant to section 1128(c)(3)(B) of the Act, five years is the minimum 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.

Petitioner argues that not being allowed to work as a CNA is a hardship for Petitioner and for nursing home residents she is not permitted to serve. Hearing Request. The fact that Petitioner is experiencing hardship may have no impact on my decision, because the law requires Petitioner's exclusion for a minimum statutory period of five years without consideration of any mitigating or equitable factors. Petitioner submitted letters of individuals in support of her case. However, I have no discretion to reduce the period of exclusion below five years and the letters submitted and the favorable comments in support of Petitioner are not relevant. I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a)(2) of the Act. Congress has provided that exclusion pursuant to section 1128(a) will be for a minimum period of five years. Accordingly, exclusion for the minimum five-year period is not unreasonable as a matter of law.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(2) of the Act, effective June 20, 2012.

/s/
Keith W. Sickendick
Administrative Law Judge