Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gladys Pino,

Petitioner,

v.

The Inspector General.

Docket No. C-12-1294

Decision No. CR2938

Date: September 30, 2013

DECISION

The Inspector General (I.G.) of the U.S. Department of Health and Human Services (HHS) notified Petitioner, Gladys Pino, that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years under 42 U.S.C. § 1320a-7(a)(1). For the reasons stated below, I conclude that the I.G. has a basis for excluding Petitioner from program participation and that the five-year exclusion is mandated by law.

I. Background

By letter dated August 31, 2012, the I.G. notified Petitioner that she was being excluded from Medicare, Medicaid, and all federal health care programs for a minimum period of five years pursuant to section 1320a-7(a)(1). The I.G. advised Petitioner that the exclusion was based on her conviction in the Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida, of a criminal offense related to the delivery of an item or service under the Medicare or a state healthcare program, including the performance of management or administrative services relating to the delivery of items or services, under any such program. Request for Hearing (RFH), Exhibit (Ex.) A at 1.

Petitioner timely filed her RFH and this case was assigned to me for hearing and decision. On October 24, 2012, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order) of that same date. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. submitted its brief (I.G. Br.) together with five exhibits (I.G. Exs. 1-5). Petitioner submitted a response brief (P. Br.) together with one exhibit (P. Ex. 1). The I.G. submitted its reply brief (I.G. Reply Br.) together with I.G. Ex. 6. On February 28, 2013, I afforded Petitioner an opportunity to provide her written direct testimony; Petitioner submitted that testimony as P. Ex. 2. *See* 42 C.F.R. § 1005.16(b). On March 29, 2013, the I.G. indicated it did not wish to cross-examine Petitioner. On May 31, 2013, I issued an order directing the parties to provide me with supplemental briefing on whether Petitioner's conviction for compounding a felony (a crime under Florida law that is related to the obstruction of justice) has a sufficient nexus to the delivery of an item or service under Medicare, Medicaid or another state health care program. The I.G. and Petitioner submitted briefs. In the absence of an objection, I admit into evidence I.G. Exs. 1-6 and P. Exs. 1-2. Because I have admitted Petitioner's written testimony into the record and the I.G. declined to cross-examine Petitioner, an in-person hearing is unnecessary. Therefore, I issue this decision on the basis of the written record.

II. Issue

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1). *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

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

HHS must exclude an individual from participation in Medicare, Medicaid or all other federally-funded health care programs 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).

The essential elements necessary to support an exclusion based on 42 U.S.C. § 1320a-7(a)(1) are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Social Security Act (Medicare) or any state health care program. A state health care program includes Medicaid. 42 U.S.C. § 1320a-7(h)(1); 42 C.F.R. § 1001.2 (definition of *State health care program*).

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

A. Petitioner pled guilty to two counts of compounding a felony and was ordered to pay restitution of $98,186.78 to the Florida Medicaid Fraud Control Unit.

In 2010, Petitioner, a speech language pathologist licensed in the state of Florida, was charged in the state of Florida with Medicaid Fraud/Filing a False Claim (Count 2) and Grand Theft over $100,000 (Count 1). I.G. Ex. 6, at 1. In her written testimony, Petitioner denied knowledge or direct involvement in the fraudulent billing of Medicaid. P. Ex. 2.

In 2012, the charges were amended and Petitioner pled guilty to two counts of compounding a felony pursuant to Florida Statute (F.S.), section 843.14. I.G. Exs. 1, at 2; 2, at 4. Under the terms of the plea agreement, Petitioner agreed to cooperate with prosecutors, which included providing a statement to investigators, and paying restitution of $98,186.78 to the Florida Medicaid Fraud Control Unit. I.G. Ex. 1, at 2-3. The state court ratified the plea agreement, indicated an intention to sentence Petitioner consistently with that agreement, and ordered her to pay $98,186.78 to the Medicaid Fraud Control Unit as restitution. I.G. Exs. 3; 4.

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

Under section 1320a-7(a)(1), Petitioner must be "convicted of a criminal offense." For the purposes of a violation under section 1320a-7(a)(1), the term "convicted" includes "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal, State, or local court" and "when the individual . . . has entered into participation in a first offender, deferred adjudication . . . where judgment of conviction has been withheld." 42 U.S.C. § 1320a-7(i); *see also* 42 C.F.R. § 1001.2. In the present matter, Petitioner pled guilty to two violations of F.S. section 843.14 and, as part of that agreement, received "a withhold of adjudication as to each count. . . ." I.G. Ex. 1, at 1, 3. Further, the state court ratified the terms of the plea agreement. I. G. Ex. 3. Petitioner does not dispute that she was convicted of a criminal offense. P. Br. at 1. Therefore, I conclude that Petitioner was convicted of a criminal offense within the meaning of section 1320a-7(a)(1).

C. Petitioner's conviction requires exclusion under section 42 U.S.C. § 1320a-7(a)(1) because her criminal conduct related to the delivery of an item or service under a state health care program (i.e., Medicaid).

In order for Petitioner to be excluded under section 1320a-7(a)(1), Petitioner's criminal conviction must be "related to" the delivery of an item or service under Medicaid. Although the term "related to" is not defined in the statute, it is well established "that an offense is 'related to' the delivery of an item or service under a covered program if there

is a . . . nexus between the offense and the delivery of an item or service under the program." *James Randall Benham*, DAB No. 2042 (2006) (internal citations omitted); *Cf. Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "related 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). Therefore, to determine whether Petitioner's offense is related to the delivery of an item or service under Medicaid, it is necessary to examine the underlying conviction.

Although Petitioner does not dispute that she was convicted of a criminal offense, she argues that her conviction was not related to the delivery of an item or service under Medicaid. P. Br. at 1-3. Petitioner explains that the Florida Medicaid Fraud Control Unit conducted an investigation into whether claims for reimbursement were properly submitted for services provided by speech language pathology assistants (SLPAs) who Petitioner was supervising and for whom services were claimed under her Medicaid provider number. Petitioner does not dispute that the investigation by the Florida Medicaid Fraud Control Unit involved whether she billed the Medicaid program under her Medicaid provider number for unsupervised services of the SLPAs. Petitioner claims first that she was unaware that under Florida law, services provided by SLPAs may be billed, at a lower rate, but only if the services provided by the SLPAs were directly supervised by a licensed speech language pathologist. Petitioner contends that she was not aware that the claims were being submitted using her Medicaid provider number for the services of SLPAs, much less that the claims were submitted at the wrong rate. P. Br. at 2. She states that as part of her plea agreement, the initial allegations of Medicaid Fraud were dismissed and the charges against her were amended to violations of compounding a felony. P. Br. at 2. Petitioner argues that the offense to which she agreed to plead guilty "is not related to the delivery of an item or service under Medicaid, but was related to the investigation [of Medicaid fraud and improper billing] conducted in this case." P. Br. at 2; *see also* P. Ex. 1, at 3. She does not dispute that as part of her negotiated plea agreement, she was ordered to pay restitution to the Florida Medicaid Fraud Control Unit of $98,186.78. P. Br. at 2.

I agree with Petitioner that she was convicted of a crime that is in the nature of obstructing an investigation. Further, the only direct statement as to what the criminal offense involved indicates that she was convicted of a failure to cooperate with the Florida Medicaid Fraud Control Unit. P. Ex. 1, at 3. In my order for supplemental briefing, I raised the concern that interpreting section 1320a-7(a)(1) to apply in this case might have the effect of rendering section 1320a-7(b)(2) (exclusion for a conviction related to the obstruction of an investigation) superfluous. Therefore, I directed the I.G. to explain how the present case is different from all cases that might only arise under section 1320a-7(b)(2). The I.G.'s response appeared to primarily focus on the fact that Petitioner was ordered to pay restitution to the Florida Medicaid Fraud Control Unit in an amount consistent with the amount of money that Petitioner had been originally charged

with stealing from the Medicaid program. As explained below, I accept the I.G.'s argument and agree that the order of restitution in this matter serves to meet the "nexus" requirement for exclusion and to distinguish the current case from other cases that could only be brought under section 1320a-7(b)(2).[2]

Although Petitioner was convicted of compounding a felony, "[i]n determining whether an offense is related to the delivery of an item or service under a covered program such as Medicaid, '[i]t is not the labeling of the offense under the state statute which determines whether the offense is program-related.'" *Lyle Kai, R.Ph.*, DAB No. 1979 (2005) *quoting Berton Siegel, D.O.*, DAB No. 1467, at 7 (1994). Therefore, I must look to more than just the conviction documents to determine if there is a nexus between the criminal offense and the Medicaid program.

As noted by the I.G., Petitioner was ordered to pay "RESTITUTION in the amount of $98,186.78 at no less than $500.00 per month to: Office of the Attorney General, Medicaid Fraud Control Unit." I.G. Exs. 3; 4. The amount of restitution is consistent with the amount of money for which Petitioner was charged with Grand Theft from the Medicaid program.[3] I.G. Ex. 6, at 5. This is significant because the order of restitution to a state Medicaid fraud control unit alone can serve as sufficient evidence of nexus between Petitioner's conviction and the Medicaid program. *Blessing Okuji*, DAB CR2343, at 5 (2011); *see also Craig Richard Wilder*, DAB No. 2416, at 8 (2011) (holding that the amount of restitution a petitioner agreed to pay is considered a reasonable measure of program loss). If an individual has been convicted of a criminal

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[2] In my order for supplemental briefing, I noted that previous exclusions brought under section 1320a-7(a)(1) that involved a conviction for an obstruction of justice also included a conviction for another offense on which the exclusion was primarily based. *See Pamela Gail Hill* DAB CR347 (1994); *William F. Middleton*, DAB CR297 (1993). The present case appeared to be the same as previous exclusions imposed under section 1320a-7(b)(2), where the excluded individuals were only convicted of an obstruction of justice related offense. *See Katherine Elaine Turner*, DAB CR2030 (2009); *Philip J. Bisig*, DAB CR1288 (2005); *Nazirul Quayum*, D.D.S., DAB CR408 (1995). However, I find that the present case differs from previous section 1320a-7(b)(2) exclusion cases because none of those decisions indicate that the excluded individuals were ordered to pay restitution.

[3] In my order for supplemental briefing, I noted that I could not consider, for purposes of finding a nexus, that Petitioner had been previously charged with Medicaid theft or fraud because she was not convicted of those charges. In this decision I am not relying on the previous unproven charges against Petitioner to conclude there is a nexus. However, this does not mean that I cannot conclude that the basis for an order of restitution is related to the original charges, thus providing evidence of a nexus between Petitioner's criminal conviction and the Medicaid program.

offense, then proof that any sentence based on that conviction included the payment of restitution to a protected program or the agency in charge of that program requires that I find a nexus between the conviction and the delivery of an item or service under the program. *Id*.; *Alexander Nepomuceno Jamias*, DAB CR1480 (2006). Thus, the I.G. has proven that there is nexus between Petitioner's conviction and the delivery of items or services under the Medicaid program.

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

Petitioner informed me that she voluntarily relinquished her Medicaid number and that she is not a Medicare provider and does not foresee becoming one. She is only contesting her exclusion because under a new Florida law she will lose her license to practice as a SLP if she is on the I.G.'s exclusion list. While I sympathize with Petitioner that Florida law has changed since she pled guilty in her criminal case, I am bound by applicable federal law. Because I have concluded that a basis exists to exclude Petitioner pursuant to 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. § 1001.2007(a)(2). The statute does not give me discretion to reduce the length of exclusion below the minimum period of five years and I conclude that the five-year exclusion imposed by the I.G. is mandated by statute.

IV. Conclusion

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

/s/
Scott Anderson
Administrative Law Judge