

Department of Health and Human Service

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Vera Atemerg Keng Fontem,)	Date: October 5, 2009
)	
Petitioner,)	Docket No. C-09-535
)	Decision No. CR2015
v.)	
)	
The Inspector General.)	

DECISION

Petitioner, Vera Atemerg Keng Fontem, is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)), effective May 20, 2009, based upon her conviction of a criminal offense relating to the delivery of an item or service under Medicare or a state health care program (Medicaid). There is a proper basis for exclusion. Petitioner’s 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

The Inspector General for the Department of Health and Human Services (the I.G.) notified Petitioner by letter dated April 30, 2009, 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)(1) of the Act. The basis cited for Petitioner’s exclusion was her conviction in the Court of Common Pleas, Franklin County, Ohio, of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. Act § 1128(a)(1) and 42 C.F.R. § 1001.101(a).

* 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.

Petitioner timely requested a hearing by letter dated June 20, 2009. The case was assigned to me for hearing and decision on July 1, 2009. On July 20, 2009, I convened a telephonic prehearing conference, the substance of which is memorialized in my Order dated July 20, 2009. Petitioner waived the right to an oral hearing and the parties agreed that this case may be decided based on their written submissions without the need for an in-person hearing.

On August 19, 2009, the I.G. filed his brief (I.G. Brief) with I.G. exhibits (I.G. Exs.) 1 and 2. On September 17, 2009, Petitioner filed her brief in response (P. Brief) with no exhibits. Petitioner did append documents to her hearing request. Attached to Petitioner's June 20, 2009 hearing request were documents that included the I.G.'s notice letter; an August 2, 2006 letter of appreciation from Petitioner's employer, with an accompanying certificate; a letter of appreciation from Petitioner's employer dated September 1, 2006, with an accompanying certificate; a letter of appreciation from Petitioner's employer from January 17, 2007, with an accompanying certificate; and a letter of appreciation from Petitioner's employer dated October 30, 2007, with an accompanying certificate. I mark the documents attached to Petitioner's June 20, 2009 hearing request as P. Ex. 1. Petitioner submitted another copy of her hearing request dated June 22, 2009, which was accompanied by a document from the Court of Common Pleas, Franklin County, Ohio, titled "Early Termination of Probation," to which were attached two receipts indicating that Petitioner had paid her court costs. I mark the documents from Court of Common Pleas P. Ex. 2. By letter dated September 25, 2009, the I.G. declined to submit a reply. I admit I.G. Exs. 1 and 2 and P. Exs. 1 and 2 as evidence.

II. Discussion

A. Issue

The Secretary of the Department of Health and Human Services (the Secretary) has by regulation limited my scope of review to one issue:

Whether there is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

There is no issue regarding whether the period of exclusion is unreasonable in this case because five years is the minimum period authorized. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.2007(a)(1)-(2).

B. Law Applicable

Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. The statute does not distinguish between felony convictions and misdemeanor convictions as a basis for mandatory exclusion.

The Act defines "conviction" to include those circumstances:

1. [W]hen 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;
2. [W]hen there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
3. [W]hen a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
4. [W]hen 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.

Act § 1128(i)(1)-(4) (42 U.S.C. § 1320a-7(i)(1)-(4)).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a)(1) 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).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis of the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(c).

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

My conclusions of law are set forth in bold followed by a statement of the pertinent facts and my analysis.

1. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

Exclusion from participation in Medicare, Medicaid, and all federal health care programs is required by section 1128(a)(1) of the Act when: (1) an individual has been convicted of a criminal offense; and (2) the conviction was related to the delivery of an item or service under Medicare or Medicaid.

a. Petitioner was convicted of a criminal offense.

Petitioner does not dispute that she was convicted of a criminal offense. Request for Hearing (RFH); P. Brief. The record reflects that Petitioner pled guilty in the Court of Common Pleas, Franklin County, Ohio, to the offense of theft by deception. I.G. Ex. 2, at 1. The court accepted Petitioner's guilty plea and sentenced her to pay restitution to the Ohio Attorney General's Medicaid Fraud Unit in the amount of \$2712. I.G. Ex. 2. These facts satisfy the definition of a "conviction" under section 1128(i)(2) and (3) of the Act.

b. Petitioner's conviction is related to the delivery of an item or service under Medicaid.

Petitioner does not dispute that her conviction is related to the delivery of an item or service under the Medicaid program. Petitioner provides a description of the facts underlying her conviction. She states,

At the time of the within offense I had been involved in the health care for six years and maintained an impeccable record. I was employed with Healthcare Depo when this incident occurred. In the course of my employment, my assignment was for four hours per day, three days per, caring for a disabled child. During this assignment there were time times (sic) when the child's mother would have me leave early if there was nothing else to be done. Unfortunately the time I was not there was billed, in that I submitted time pre-

filled out time sheets to my employer and I was paid for the full time. My intent was not to do something wrong but I used bad Judgment and accept complete responsibility for my actions.

RFH. The record shows that Petitioner's conviction was for falsifying timesheets regarding services provided to a child under the Ohio Medicaid program, as reflected by the court's ordering restitution to the Ohio Medicaid Fraud Unit. I.G. Ex. 2, at 1; RFH. False billing of Medicare or Medicaid has long been considered program related and a conviction for such conduct has been found to be a basis for exclusion by ALJs and appellate panels of the Departmental Appeals Board. *Wendi Mueller*, DAB CR1478 (2006); *Mary Jo Izzo*, DAB CR1136 (2004); *Jack W. Greene*, DAB No. 1078 (1989), *aff'd sub nom Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990). I also conclude that there is the required nexus between the conduct for which Petitioner was convicted and the delivery of an item or service under Medicaid and there is a basis for exclusion pursuant to section 1128(a)(1) of the Act.

2. Exclusion for five years is not unreasonable as a matter of law.

Petitioner argues in mitigation of her exclusion that this is her only conviction; that her probation was terminated early and that the court will consider expunging her record; that she has admitted responsibility and paid her debt to society; that she has repented and appeals for redemption; and that a five-year exclusion is too harsh, devastating to her family, and destructive to her vocation. P. Br. at 1-3.

I am unable to consider Petitioner's arguments. The I.G. is required to impose the mandatory minimum five-year period of exclusion from Medicare, Medicaid, and all federal health care programs under the circumstances of this case, and I do not have the authority to alter that period of exclusion. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

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)(1) of the Act, effective May 20, 2009.

/s/
Keith W. Sickendick
Administrative Law Judge