

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)
) Date: March 14, 2008
Stacy Lyn Archibald,)
)
)
Petitioner,) Docket No. C-07-764
) Decision No. CR1751
-v.-)
)
The Inspector General.)
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DECISION

Petitioner is excluded 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)), effective August 20, 2007, based upon her conviction for a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a basis for exclusion. Petitioner's exclusion for the minimum period¹ 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 of the Department of Health and Human Services (I.G.) notified Petitioner by letter, dated July 31, 2007, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act based upon her conviction in the District Court of Muskogee County, Oklahoma, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The I.G. advised her that the exclusion was for the minimum statutory period of five years effective 20 days from the date of the letter.

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.

Petitioner, by counsel, requested a hearing before an administrative law judge (ALJ) by letter dated September 25, 2007. On October 29, 2007, the case was assigned to me for hearing and decision. On November 16, 2007, I convened a prehearing telephonic conference, the substance of which was memorialized in my Order and Initial Briefing Schedule issued November 16, 2007. During the conference the I.G.'s counsel stated her position that this case may be resolved based on written submissions in lieu of an oral hearing and that the I.G. desired to move for summary judgment absent Petitioner's waiver of her right to an oral hearing. Petitioner's counsel indicated that Petitioner would not waive her right to a hearing. I advised the parties that the I.G. would be permitted to file a motion for summary judgment and supporting evidence and I established the briefing schedule to which the parties agreed.

On December 31, 2007, the I.G. filed its brief (I.G. Brief) with exhibits (I.G. Exs.) 1 through 5, and Proposed Findings of Fact and Conclusions of Law.² On February 14, 2008, Petitioner filed her response (P. Brief), with exhibits (P. Exs.) 1 and 2. On February 29, 2008, the I.G. filed its reply (I.G. Reply). No objections were raised to the exhibits as submitted. I admit P. Exs. 1 and 2 and I.G. Exs. 1 through 5.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the undisputed assertions of fact in the pleadings and the exhibits admitted:

1. On August 20, 2006, Petitioner was charged with one count of Obtaining Cash or Merchandise by Bogus Check/False Pretenses, a misdemeanor, under Title 21, Oklahoma Statutes (O.S.) § 1541.1, punishable by imprisonment for up to one year and/or a fine up to \$1000, or both. I.G. Exs. 3, at 1, 4, at 1 and 3, and 5, at 1; P. Ex. 1, at 1.

² The I.G. did not style its initial pleading as a motion for summary judgment or discuss the legal standard to be applied to a motion for summary judgment. However, Petitioner recognized that the I.G. was authorized to file a motion for summary judgment and specifically noted she was responding to the I.G.'s initial pleading as if it was a motion for summary judgment. P. Brief at 1. The I.G.'s Reply does refer to the motion for summary judgment and alludes to the standard applicable. I find no prejudice to either party as both were clearly aware that the I.G. was requesting summary judgment.

2. Petitioner entered a plea of *nolo contendere* to the charge of Obtaining Cash or Merchandise by Bogus Check/False Pretenses, and the District Court of Muskogee County, Oklahoma, accepted that plea on August 17, 2006. P. Brief at 1; I.G. Ex. 5; P. Ex. 1.
3. On August 17, 2006, the District Court of Muskogee County, Oklahoma, deferred entering judgment and sentence for one year based upon Petitioner's *nolo contendere* plea to the charge of Obtaining Cash for Merchandise by Bogus Check/False Pretenses, subject to her fulfillment of the conditions of probation before judgment, which included payment of a \$500 fine and \$50 for Victim Compensation Assessment; prohibition of employment with a vulnerable adult; and that Petitioner would not violate any local, state, or federal law. I.G. Ex. 5; P. Ex. 1; P. Brief at 2.
4. Petitioner does not dispute that the charge against Petitioner of Obtaining Cash for Merchandise by Bogus Check/False Pretenses related to the delivery of an item or service under Medicare or a state health care program.
5. The I.G. notified Petitioner by letter dated July 31, 2007, 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. I.G. Exs. 1, and 2, at 2-4.
6. Petitioner filed a timely request for hearing by letter dated September 25, 2007. I.G. Ex. 2, at 1.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction over this case.
2. Summary judgment is appropriate.
3. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)).
4. Petitioner was convicted of an offense related to the delivery of an item or service under Medicare or a state health care program.
5. There is a basis for mandatory exclusion of Petitioner pursuant to section 1128(a)(1) of the Act.

6. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years and that period is presumptively reasonable.

C. Issue

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

D. Applicable Law

Pursuant to section 1128(a)(1) of the Act, the Secretary of Health and Human Services must exclude from participation in Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under title XVIII of the Act (Medicare) or under any state health care program. 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. Pursuant to 42 C.F.R. § 1001.102(b), the exclusion period may be extended based on the presence of specified aggravating factors. Only if aggravating factors justify an exclusion period longer than five years may mitigating factors be considered to reduce the exclusion period to no less than five years. 42 C.F.R. § 1001.102(c).

The standard of proof is a preponderance of the evidence. 42 C.F.R. § 1001.2007(c). Petitioner bears the burden of proof and persuasion on affirmative defenses or mitigating factors. I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b) and (c).

E. Analysis

1. Summary judgment is appropriate.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2 and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified in 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). The 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 must prevail 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 which, if true, would refute the facts relied upon by the

moving party. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Medical Clinic*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997) (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 Millennium CMHC*, DAB CR672 (2000); *New Life Plus Center, CMHC*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case as discussed hereafter. The sole issue in dispute before me is a question of law, *i.e.*, whether Petitioner was convicted within the meaning of the Act. P. Brief at 1. Accordingly, summary judgment is appropriate.

2. There is a basis for exclusion under section 1128(a)(1) of the Act.

On April 20, 2006, the Attorney General of Oklahoma filed an Information against Petitioner alleging that Petitioner

committed the crime of Obtaining Money by False Pretense, a misdemeanor, in violation of Title 21 O.S. § 1541.1, by obtaining from Healthcare Innovations, Inc. payments in an amount of less than \$500.00 by means of causing false claims to be filed for home health care patient Patricia Rozell, knowing the claims to be false with intent to cheat and defraud.

I.G. Ex. 3, at 1. The Affidavit of Probable Cause for the issuance of an arrest warrant for Petitioner, issued April 20, 2006 (I.G. Ex. 4), indicates that Petitioner admitted to having submitted false documents that home health services were provided, which caused Medicare to be billed for services never provided. Petitioner earned \$144 from her employer based on the falsified records. I.G. Ex. 4, at 1-2.

Petitioner entered a plea of *nolo contendere* to one count of the crime of Obtaining Cash or Merchandise by Bogus Check/False Pretenses in violation of Title 21, O.S. § 1541.1. On August 17, 2006, the District Court of Muskogee County, Oklahoma, deferred the entry of judgment and a one-year sentence to confinement for a period of one year during which Petitioner was placed on probation. P. Brief at 1; I.G. Ex. 5, at 1-2; P. Ex. 1, at 1-2. Petitioner was ordered to pay a \$500 fine and a \$50 Victim Compensation Assessment; she was prohibited from employment with any vulnerable adult; and it was specified that she would not violate any local, state, or federal law during the probation period. P. Brief at 2; I.G. Ex. 5; P. Ex. 1.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

(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 under any State health care program.

Clearly the statute requires exclusion from participation any individual or entity: (1) convicted of a criminal offense; (2) where the offense is related to the delivery of an item or service; and (3) the item or service is or was to be delivered under Medicare or any state health care program.

Petitioner argues that she was not convicted under Oklahoma law. P. Brief at 1. She asserts that she entered a *nolo contendere* plea not fully appreciating the consequences of that plea, namely, that the plea could be deemed a conviction for the purposes of the I.G.'s exclusion. She claims that she believed that by entering the plea, the charge would be "totally dismissed" if she had no violations of the law for the one-year period of deferred judgment. She argues that her plea was not truly knowing and voluntary and cannot support the exclusion. P. Brief at 1-4; P. Ex. 2.

Petitioner also disputes the accuracy of the events that led to the criminal charge as stated in the charging documents (I.G. Exs. 3 and 4). She asserts that in conjunction with performing a home health visit for the patient in question, she transported the patient to a dialysis appointment; that the service was not in lieu of providing home health services; and that she did not earn money for services not provided. She also asserts that as an employee she had no control over her employer's billing practices and cannot be deemed culpable of any Medicare fraud committed by the employer. She denied knowing receipt of money for services fraudulently billed to Medicare. She alleges that she merely complied when her employer instructed her to visit patients and then made notes of those visits. She also alleges that did not know which specific visits her employer would or would not bill to Medicare. She does not accept that she committed any wrongdoing but asserts that she merely pleaded *nolo contendere* to receive a deferred judgment and sentence. P. Brief at 2-3; P. Ex. 2. Petitioner's arguments are without merit.

Pursuant to section 1128(i) of the Act, an individual is “convicted” of a criminal offense when a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; or when there has been a finding of guilt in a federal, state, or local court; or when a plea of guilty or no contest has been accepted in a federal, state, or local court; or when an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. The decision of the U.S. Court of Appeals for the Ninth Circuit in *Travers v. Shalala*, 20 F.3d 993, 996-99 (9th Cir. 1994) is instructive. The court in *Travers* recognized that it is the Social Security Act, and not state law, that defines the term “conviction,” and that it is necessary to examine the substance of the proceedings in the criminal court rather than to rely upon characterizations used by the state or the parties. The court in *Travers* also defined “deferred prosecution” as an agreement between the prosecutor and the defendant pursuant to which prosecution of the charges is delayed, recognizing that “deferred adjudication” does not involve deferral of prosecution. 20 F.3d at 996-97. According to the court, deferred prosecution would not amount to a conviction under the Act, but a deferred adjudication clearly does. In this case, Petitioner received the benefit of a deferred adjudication in the Oklahoma state court. Although her deferred adjudication may not be considered a “conviction” under the laws of the State of Oklahoma, her deferred adjudication clearly is a conviction within the meaning of the Act, section 1128(i).

Petitioner’s plea that she did not understand that her *nolo contendere* plea and deferred adjudication in the Oklahoma court would trigger the mandatory exclusion required by section 1128(a)(1) of the Act is also without merit. Whether or not Petitioner’s plea was knowing and voluntary and whether she may have misrepresented facts to the Oklahoma court in order to receive the benefit of deferred adjudication are not issues within my jurisdiction. The Secretary has provided by regulation that the underlying conviction is not reviewable or subject to collateral attack, whether on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d).

Petitioner does not dispute the material facts: (1) Petitioner entered a *nolo contendere* plea to one count of a misdemeanor charge; (2) the Oklahoma court accepted that plea on August 17, 2006; and (3) based on the plea, the state court stayed entry of judgment and the imposition of a one-year prison sentence pending Petitioner’s fulfillment of certain conditions of her plea bargain. Petitioner also does not dispute that the offense was related to the delivery of an item or service and that the item or service was to be delivered under Medicare or any state health care program. Based on the foregoing, I find as a matter of law that a “conviction” has occurred within the meaning of section 1128(i)(3) of the Act. Thus, there is a basis for Petitioner’s exclusion under section 1128(a)(1) of the Act and the I.G. entitled to judgment as a matter of law. Petitioner has not demonstrated the existence of any material fact that would preclude summary judgment for the I.G.

3. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years.

Petitioner has not disputed that the minimum period of exclusion pursuant to section 1128(a) is five years as mandated by section 1128(c)(3)(B), if I determine that she is subject to mandatory exclusion. I have found there is a basis for her exclusion pursuant to section 1128(a) and the minimum period of exclusion is thus five years.

III. Conclusions

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act, for the minimum statutory period of five years, effective August 20, 2007.

/s/

Keith W. Sickendick
Administrative Law Judge