

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Heather L. Boisot,

Petitioner

v.

The Inspector General.

Docket No. C-11-523

Decision No. CR2447

Date: October 11, 2011

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Heather L. Boisot, from participating in Medicare and other federally funded health care programs for a period of at least five years.

I. Background

The I.G. determined to exclude Petitioner from participating in Medicare and other federally funded health care programs because he found that Petitioner had been convicted of a criminal offense as is defined at section 1128(a)(1) of the Social Security Act (Act). That section mandates the exclusion of any individual who is convicted of a criminal offense that is related to the delivery of an item or service under Medicare or a federally funded health care program, including a State Medicaid program. Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision.

The parties have submitted briefs, including a reply brief from the I.G., and proposed exhibits. Neither party requested that I convene an in person hearing. The I.G. submitted five proposed exhibits that are identified as I.G. Exhibit (Ex.) 1 – I.G. Ex. 5. Petitioner submitted a single exhibit, her declaration, which is identified as P. Ex. 1.

Petitioner objects to my receiving into evidence I.G. Ex. 4 and I.G. Ex. 5. I.G. Ex. 4 is a report from the State of Maine Department of Public Safety, Maine Drug Enforcement Agency. I.G. Ex. 5 is a declaration signed by Eric Haefener, a Senior Special Agent employed by the I.G. Petitioner objects to I.G. Ex. 4 because it contains hearsay. I agree with Petitioner that the exhibit contains hearsay. That is not generally a basis to exclude an exhibit in an administrative proceeding such as this one, and I routinely admit hearsay. 42 C.F.R. § 1005.17(b). Moreover, there are reasons for me to find that I.G. Ex. 4 is a reliable document. It is a public record of a State agency that was made in the course of its business. Furthermore, it contains an admission by Petitioner as to a key fact that was the basis for the criminal charges filed against her. Specifically, Petitioner admitted having called in false prescriptions for a recipient of benefits from Maine's Medicaid program. Thus, the exhibit would be admissible even under recognized exceptions to common law and federal rules of evidence. For these reasons, I overrule Petitioner's objections to I.G. Ex. 4.

As to I.G. Ex. 5, I see nothing about the exhibit that would make it unreliable. Some of the information in the exhibit, consisting of Medicaid prescription claims data, is taken from public records. I therefore overrule Petitioner's objections to I.G. Ex. 5. I receive into the record I.G. Exs. 1-5 and P. Ex. 1.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue in this case is whether the I.G. must exclude Petitioner for a period of at least five years.

B. Findings of Fact and Conclusions of Law

I make the following findings of fact and conclusions of law.

1. The I.G. must exclude Petitioner because she was convicted of a criminal offense related to the delivery of State Medicaid items or services.

On August 24, 2010, Petitioner pled guilty to two counts of a criminal complaint that had been filed against her in the State of Maine. I.G. Ex. 2; I.G. Ex. 3. She pled guilty to charges that she forged a written instrument and that she unlawfully possessed scheduled drugs. *Id.* The charges to which Petitioner pled guilty were the product of an investigation conducted by the Maine Drug Enforcement Agency. That investigation found, based in part on Petitioner's admissions, that Petitioner, while employed as a registered nurse, had called in false prescriptions to a pharmacy for controlled substances for various individuals. At least one of these individuals, "KT", is a recipient of benefits

under Maine's Medicaid program. I.G. Ex. 5 at 2. The investigation found further that, on at least 28 occasions, Petitioner had obtained Hydrocodone, a controlled substance, using false prescriptions and had used the State Medicaid accounts of Medicaid recipients to pay for the prescriptions. I.G. Ex. 4 at 3; *see* I.G. Ex. 5 at 3.

These facts establish that Petitioner was convicted of a crime as is defined by section 1128(a)(1) of the Act. Petitioner caused claims to be made on the Medicaid account of at least one individual (KT) for controlled substances that she obtained fraudulently and for her own use. The fraud that Petitioner committed was therefore directed in part against Maine's Medicaid program. That Medicaid was a direct target of Petitioner's crime is more than sufficient to establish that the crime was related to the delivery of Medicaid items or services.

Petitioner asserts that, in fact, she did not make false representations concerning Medicaid recipients to contain controlled substances unlawfully. She states that she paid for the prescriptions she obtained either with cash or through private insurance and that her false claims were made under her own name, her sister's name, or her mother's name, none of whom were ever Medicare beneficiaries or recipients of Medicaid. P. Ex. 1.

Petitioner's assertions are irrelevant. She is, in effect, now attempting to deny the facts (some of which she previously admitted) of which she was convicted by creating an alternative basis for the charges to which she pled guilty. *See* I.G. Ex. 4 at 2. However, the facts that underlie the criminal charges to which Petitioner pled guilty may not be litigated here. The I.G.'s authority to exclude Petitioner derives from her conviction and the charges that form the basis for that conviction. Petitioner may not now rewrite the basic facts of her case, to which she pled guilty, to establish a basis for her conviction that depicts her crimes as being unrelated to federally funded health care programs.

2. An exclusion of at least five years is mandatory.

The length of Petitioner's exclusion, at least five years, is reasonable as a matter of law because that is the minimum mandatory period for which the I.G. must exclude any individual who is convicted of a section 1128(a)(1) offense. Act Section 1128(c)(3)(B).

_____/s/
Steven T. Kessel
Administrative Law Judge