

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jocelynn Lorenzo Mayuga,
(OI File No. H-14-42339-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-363

Decision No. CR3852

Date: May 11, 2015

DECISION

Petitioner, Jocelynn Lorenzo Mayuga, pled no contest to one misdemeanor count of petit larceny for submitting false claims to the state Medicaid programs for services that were not provided to her minor child. Based on this, the Inspector General (I.G.) has excluded her for five years from participating in Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(1) of the Social Security Act (Act). Petitioner appeals the exclusion. For the reasons discussed below, I find that the I.G. properly excluded Petitioner Mayuga and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated September 30, 2014, the I.G. notified Petitioner that she was excluded from participating in Medicare, Medicaid, and all federal health care programs for a period of five years because she had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or state health care program. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. I.G. Ex. 1. Petitioner requested review.

Each party submitted a written argument (I.G. Br.; P. Br.). The I.G. submitted four exhibits (I.G. Exs. 1-4) and a reply brief (I.G. Reply). Petitioner submitted two exhibits (P. Exs. 1-2). In the absence of any objection, I admit into evidence I.G. Exs. 1-4 and P. Exs. 1-2.

The I.G. indicates that an in-person hearing is not necessary and submits no declarations from any proposed witness. I.G. Br. at 7. Petitioner, on the other hand, asserts that an in-person hearing is necessary, but lists no witnesses. P. Br. at 7. Because there are no witnesses to examine or cross-examine, I decline to schedule a hearing that would serve no purpose.

Discussion

Petitioner must be excluded from program participation for a minimum of five years, because she was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, within the meaning of section 1128(a)(1).¹

Under section 1128(a)(1) of the Act, the Secretary of Health and Human Services must exclude an individual who has been 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 C.F.R. § 1001.101(a). A plea of nolo contendere (no contest) is considered a conviction for purposes of a section 1128 exclusion. Act § 1128(i)(3); 42 C.F.R. § 1001.2.

Petitioner submitted false claims to the Virginia Medicaid program, claiming payment for personal and respite care services purportedly provided to her minor child between July 2008 and December 2011. The services were not provided. I.G. Ex. 4 at 1-2. Petitioner was charged with stealing funds from the Medicaid program. I.G. Ex. 2. On June 28, 2013, she pled no contest to one count of petit larceny, in violation of section 18.2-96 of the Virginia Code; the court accepted her plea. I.G. Ex. 3. Petitioner subsequently agreed to pay the United States and the Commonwealth of Virginia \$202,443.57 to settle their claims against her. I.G. Ex. 4.

Petitioner concedes that she was convicted of a criminal offense for which exclusion is required. P. Br. at 1, 2. At the same time, she argues that her offense was not related to the delivery of an item or service under the Medicaid program because it arose in her personal capacity as the mother of a child beneficiary, not in her professional capacity

¹ I make this one finding of fact/conclusion of law.

(she is apparently a doctor). P. Br. at 2. The statute makes no such distinction. So long as a conviction is “related to” the delivery of an item or service under the state healthcare program – as Petitioner’s conviction unquestionably was – section 1128 applies.

Further, because exclusion under section 1128(a)(1) is *mandatory*, the I.G. has no discretion. He may not opt to impose a less onerous period of exclusion under section 1128(b), as Petitioner suggests he do here.

Petitioner also complains that the I.G. did not give her sufficient notice of the proposed exclusion. She charges that this omission represented a departure from his usual practice, violating the Administrative Procedures Act, because the change was made without affording notice and comment. P. Br. at 2, 7-11. But not every procedural change requires notice-and-comment rule-making, and the regulations already address the issue of when the I.G. should send a proposed notice. They provide that the I.G. send a notice to exclude if he intends to impose a period of exclusion that is greater than five years (or under other circumstances not applicable here). 42 C.F.R. § 1001.2001(a). Nothing in the statute or regulations compels the I.G. to afford an individual advance notice that he intends to impose a mandatory exclusion for the minimum period required by statute. The distinction makes sense. Because the I.G. considers aggravating and mitigating circumstances in determining the length of any exclusion beyond five years, affording the individual an opportunity to present mitigation in advance gives him the opportunity to consider mitigating evidence he may not be aware of. However, because this exclusion must be for five years, mitigating evidence is irrelevant. 42 C.F.R. §§ 1001.102(c); 1001.2007(a)(2). And, if the I.G. errs in imposing a five-year exclusion, the individual has ample opportunity to point that out by means of the administrative review process. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

Conclusion

Because she was convicted of a criminal offense related to the delivery of an item or service under a state health care program (Medicaid), Petitioner Mayuga must be excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years.

/s/

Carolyn Cozad Hughes
Administrative Law Judge