

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)
)
) Date: October 31, 2008
Jennifer P. Kuehn,)
)
)
) Petitioner,) Docket No. C-08-546
) Decision No. CR1859
)
) -v.-)
)
)
The Inspector General.)
)
)

DECISION

Petitioner, Jennifer P. Kuehn, 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 (the Act) (42 U.S.C. § 1320a-7(a)(1)), effective May 20, 2008, based upon her conviction of a criminal offense related to delivery of an item or service under Medicare or a state health care program. 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, 2008, 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

* 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.

basis cited for Petitioner's exclusion was her conviction in the Superior Court of Washington, King County, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. *See* Act § 1128(a)(1); 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.101(a).

Petitioner timely requested a hearing by letter dated June 10, 2008. The case was assigned to me for hearing and decision on June 25, 2008. On July 14, 2008, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated July 14, 2008. During the prehearing conference, Petitioner did not waive her right to an oral hearing, and the I.G. requested that a schedule be set for briefing its anticipated motion for summary judgment.

The I.G. filed a motion for summary judgment and supporting brief on August 5, 2008 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 through 6. Petitioner filed her response to the motion for summary judgment on September 8, 2008 (P. Brief), with exhibits (P. Ex.) 1 through 5. The I.G. waived filing a reply brief by letter dated September 16, 2008. No objection has been made to the admissibility of any of the proposed exhibits and I.G. Exs. 1 through 6 and P. Exs. 1 through 5 are admitted.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings, and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. On October 22, 2007, Petitioner was convicted, pursuant to her plea of one count of theft in the first degree and two counts of Medicaid false statements in violation of the Revised Code of Washington, by the Superior Court of Washington, County of King. I.G. Ex. 2.
2. By pleading guilty to the count of theft in the first degree, Petitioner admitted that she wrongfully obtained or exerted unauthorized control over the property or services of another of a value in excess of \$1500. I.G. Ex. 5, at 1.
3. By pleading guilty to the two counts of Medicaid false statements, Petitioner admitted that on two occasions she knowingly made or caused to be made a false statement or representation of a material fact in an application for payment to a Washington State health-care program. I.G. Ex. 5, at 2-3.

4. On October 22, 2007, Petitioner was sentenced to be confined for 30 days which was converted to 240 hours of community service, to make restitution of \$5,935.96 to the state Medicaid program, to pay \$500 to the victim assistance fund, and to 12 months of community supervision. I.G. Ex. 2.
5. Petitioner does not deny that the charges to which she pled guilty arose from her work as a home health aide and her filing of claims for reimbursement to a state health care program for work that she did not perform. P. Brief at 2; I.G. Brief at 2-4; I.G. Ex. 4.
6. The I.G. notified Petitioner by letter dated April 30, 2008, 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.
7. Petitioner timely requested a hearing by letter dated June 10, 2008.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.
2. Summary judgment is appropriate.
3. Petitioner 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) of the Act.
4. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.
5. 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. Issues

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

Whether there is a basis for the imposition of the exclusion; and,

Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

In this case, there is no issue as to the reasonableness of the proposed period of exclusion as it is the minimum period of five years mandated by the Act. The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b) and (c).

D. Applicable Law

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 a state health care program. Pursuant to section 1128(i) of the Act, an individual is convicted of a criminal offense when: (1) a judgement of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) when there is a finding of guilt by a court; (3) when a plea of guilty or no contest is accepted by a court; or (4) when the individual has entered into any arrangement or program where judgment of conviction is withheld.

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 period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). No aggravating factors are cited by the I.G. in this case, and the I.G. does not propose to exclude Petitioner for more than the minimum period of five years.

E. Analysis

1. Summary judgment is appropriate in this case.

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). An 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 prevails 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*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. Petitioner does not dispute that she was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program; that there is a basis for her exclusion; or that the minimum period of exclusion is five years. She requests only that I consider the hardship her exclusion will cause. The issue before me for resolution is an issue of law, no material facts are in dispute, and summary judgment is appropriate.

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

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.

The statute requires the Secretary to exclude 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 delivery of the item or service was under Medicare or a state health care program. Petitioner does not dispute that she was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Petitioner also does not dispute that the conviction was related to the delivery of an item or service under Medicare or a state health care program. Accordingly, I conclude that there is a basis for Petitioner's exclusion, and the exclusion is required by section 1128(a)(1).

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 an exclusion pursuant to section 1128(a)(1) is five years as mandated by section 1128(c)(3)(B). I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a)(1), and the minimum period of exclusion is thus five years. The I.G. and I do not have authority under the Act to impose a period of less than five years. Thus, Petitioner's requests and arguments for a lesser period of exclusion cannot be considered to reduce the period of exclusion.

Petitioner indicates in her brief that she has questions regarding the meaning of various terms and phrases contained in the notice of exclusion and the attachment to that notice. Petitioner should request clarification from the office that issued the notice of exclusion referenced in the second to last paragraph of the document at P. Ex. 5.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, effective May 20, 2008, 20 days after the I.G.'s April 30, 2008 notice of exclusion.

/s/
Keith W. Sickendick
Administrative Law Judge