Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Celestine Tony Okwilagwe,
(O.I. File No. H-12-41812-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-322

Decision No. CR2920

Date: September 6, 2013

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner Celestine Tony Okwilagwe from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s Motion and determination to exclude Petitioner are based on section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The undisputed material facts in this case require the imposition of the five-year exclusion. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

On June 21, 2012, in the 265th Judicial District Court, Dallas County, Texas, Petitioner appeared with counsel and tendered a negotiated plea of guilty to the Class A Misdemeanor charge of Attempted Theft, in violation of TEX. PENAL CODE ANN. § 31.03. I.G. Ex. 4. The District Court accepted Petitioner's guilty plea, placed Petitioner on community supervision for one year, and entered its Order of Deferred Adjudication on that date. I.G. Ex. 5. Petitioner was ordered to perform 80 hours of community service, and was required to pay restitution in the sum of $4730.84 and

additional costs. On December 19, 2012, the District Court's Order Dismissing Proceedings and Granting Early Discharge from Community Supervision Following Deferred Adjudication was filed, by which "all proceedings in this cause against the defendant, including the indictment or information, are hereby dismissed." I.G. Ex. 6; P. Ex. 2.

Section 1128(a)(1) of the Act mandates the exclusion of "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . any State health care program" for a period of not less than five years. On December 31, 2012, the I.G. notified Petitioner that he was to be excluded pursuant to the terms of section 1128(a)(1) for a period of five years.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action on January 18, 2013.

I attempted to conduct a prehearing conference by telephone pursuant to 42 C.F.R. § 1005.6 to discuss procedures for addressing the issues presented by this case, but was unable to do so because Petitioner failed to provide a telephone number at which he could be contacted. Accordingly, by Order of February 28, 2013, I established procedures and a schedule for the submission of documents and briefs.

That Order required amendment after Petitioner's counsel filed his written entry of appearance on June 13, 2013. The circumstances attending the development of this case after that point, and the amendments to the original Order, appear in my Order of July 31, 2013. By the terms of that latter Order the record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on August 30, 2013.

The evidentiary record on which I decide the issues before me contains nine exhibits: six were proffered by the I.G. marked I.G. Exhibits 1-6 (I.G. Exs. 1-6), and Petitioner proffered three exhibits (P. Exs. 1-3). In the absence of objection, I have admitted all proffered exhibits.

II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the context of this record, they are:

a. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act; and

b. Whether the five-year length of the proposed period of exclusion is unreasonable.

Application of the controlling authorities to the undisputed facts of this case requires that these issues be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner's exclusion, for his predicate conviction has been established. A five-year period of exclusion is the minimum period required by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), and is therefore as a matter of law not unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of a criminal offense related to the delivery of an item or service under title XVIII of the Act (the Medicare program) or any state health care program (the Medicaid program). The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.101(a). Section 1128(a)(1) does not distinguish between felonies and misdemeanors as predicates for exclusion.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court," Act § 1128(i)(1); "when there has been a finding of guilt against the individual . . . by a Federal, State, or local court," Act § 1128(i)(2); "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal, State, or local court," Act § 1128(i)(3); or "when the individual . . . 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)(4). These definitions are repeated in slightly different language at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) is mandatory and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) repeats the statutory provision.

IV. Findings and Conclusions

I find and conclude as follows:

1. On June 21, 2012, in the 265th Judicial District Court, Dallas County, Texas, Petitioner pleaded guilty to the Class A Misdemeanor charge of Attempted Theft, in violation of TEX. PENAL CODE ANN. § 31.03. I.G. Ex. 4. The District Court accepted Petitioner's guilty plea and entered its Order of Deferred Adjudication on that date. I.G. Ex. 5.

2. The accepted plea of guilty and the Order of Deferred Adjudication described above constitute a "conviction" within the meaning of sections 1128(a)(1), 1128(i)(3), and 1128(i)(4) of the Act, and 42 C.F.R. § 1001.2.

3. A nexus and a common-sense connection exist between the criminal offense of which Petitioner was convicted, as noted above in Findings 1 and 2, and the delivery of an item or service under the Medicaid program. I.G. Ex. 2; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

4. Petitioner's conviction constitutes a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, pursuant to section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1).

5. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, as a matter of law it is not unreasonable. Act, section 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

6. There are no disputed issues of material fact and summary disposition is appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (Medicare) or any state health care program. *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005); s*ee also Russell Mark Posner*, DAB No. 2033, at 5-6 (2006).

This record reflects uncontested and objective proof of both essential elements. Court records of the criminal proceedings against Petitioner are before me as I.G. Exs. 3, 4, 5, and 6, and P. Ex. 2. Those exhibits establish the first essential element. Petitioner notes that under Texas law he would not now be considered convicted of the violation to which he pleaded guilty, but he concedes that federal, and not Texas, law controls this situation. That concession is justified: even though his description of the resolution of the proceedings is perfectly accurate, and even though the charge to which he pleaded guilty has been dismissed, those proceedings still constitute a "conviction" within the precise terms of section 1128(i)(4) of the Act. Similar regulatory language appears at 42 C.F.R. § 1001.2, and both statute and regulation have been applied by the Departmental Appeals

Board (Board) in rejecting arguments similar to Petitioner's. *Ellen L. Morand*, DAB No. 2436 (2012); *Henry L. Gupton*, DAB No. 2058 (2007), *aff'd sub nom. Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008); *Carolyn Westin*, DAB No. 1381 (1993), *aff'd sub nom. Westin v. Shalala*, 845 F. Supp. 1446 (D. Kan. 1994).

The relation of Petitioner's crime to the Medicaid program is elaborated by the investigators who developed the case against Petitioner in I.G. Ex. 2. In summary, Petitioner was at relevant times the manager and co-owner of a business called South Medical Equipment and Supply (South Medical), a business that participated in the Texas Medicaid program. South Medical billed Medicare for medical supplies it did not deliver as claimed, and overcharged for supplies it purportedly delivered to program beneficiaries. In his plea agreement, Petitioner acknowledged his criminal participation in South Medical's activity as originally charged. I.G. Exs. 3, 4. Those facts establish the nexus or common-sense connection to the Medicaid program defined in *Berton Siegel, D.O.*, DAB No. 1467.

Petitioner asks that the period of his exclusion be reduced to "one year from the entry of the original Order of the 265th Judicial District Court . . . ," and relies on the terms of section 1128B(a)(6)(ii) of the Act, 42 U.S.C. § 1320a-7(b)(6)(ii). P. Ans. Br. 2. His reliance on that section of the Act is very seriously misplaced, given that it addresses the circumstances under which an individual otherwise eligible for benefits under certain federal health care programs may be declared ineligible for them if convicted of crimes adversely affecting those programs. The section Petitioner cites has nothing whatsoever to do with the exclusion process established by sections 1128(a) or 1128(b) of the Act.

Petitioner asserts that he "has been unable to act in the medical field for more than a year at this point . . . ," and suggests that this is somehow unfair to him. P. Ans. Br. 1. But as the Board observed in *Joann Fletcher Cash*, DAB No. 1725 (2000), the precise point of the exclusion mechanism is to prevent untrustworthy individuals from involvement with protected health care programs. That this exclusion may have a limiting effect on an excluded individual's future employment is a natural and predictable consequence of any such exclusion, including this one. The substantial closing of certain occupations to Petitioner for five years and the probable loss of earnings from those occupations are no bar to the mandatory imposition of this exclusion. *Henry L. Gupton*, DAB No. 2058; *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

Once an individual's conviction is found to have been "related to the delivery of an item or service under Medicare or a State health care program," and thus to lie within the application of section 1128(a)(1), the imposition of the five-year minimum exclusion established by section 1128(c)(3)(B) of the Act is mandatory and beyond the authority of the I.G. or an Administrative Law Judge (ALJ) to reduce, modify, or suspend. The Board has used the plainest language to make the point: "Petitioner's exclusion was mandatory under the Act once the nexus was established between his offense and the delivery of an

item or service under the Medicare program. The ALJ had no discretion to impose a lesser remedy." *Salvacion Lee, M.D.*, DAB No. 1850, at 4; *Lorna Fay Gardner*, DAB No. 1733, at 6 (2000); *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Napoleon S. Maminta, M.D.*, DAB No. 1135 (1990). Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, as a matter of law it is not unreasonable.

Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). Resolution of a case by summary disposition is fitting when settled law can be applied to undisputed material facts. *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009); *Michael J. Rosen, M.D.*, DAB No. 2096. The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of law, and this Decision issues accordingly.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition must be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Celestine Tony Okwilagwe from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is sustained.

/s/
Richard J. Smith
Administrative Law Judge