Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sandra Lou Halverson
(O.I. File No. H-12-41664-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-225

Decision No. CR2825

Date: June 13, 2013

DECISION

The Inspector General (I.G.) of the Department of Health and Human Services (HHS) excluded Petitioner, Sandra Lou Halverson, from participating in Medicare, Medicaid, and all other federal health care programs for five years pursuant to section 1128(a)(2) of the Social Security Act, codified in the United States Code at 42 U.S.C. § 1320a-7(a)(2). Petitioner requested a hearing to challenge her exclusion. For the reasons explained below, I conclude that the I.G. has a basis for excluding Petitioner from program participation and that the five-year exclusion is required by law. Therefore, I affirm the I.G.'s exclusion of Petitioner.

I. Background and Procedural History

By letter dated October 31, 2012, the I.G. notified Petitioner, a nurse aide, that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years pursuant to 42 U.S.C. § 1320a-7(a)(2). I.G. Exhibit (Ex.) 1. The I.G. advised Petitioner that her exclusion was based on her conviction

> in the State of Wisconsin, Circuit Court Branch 1, Pierce County, of a criminal offense related to neglect or abuse of patients, in connection with the delivery of a health care item or service, including any offense that the Office of Inspector General (OIG) concludes entailed, or resulted in, neglect or abuse of patients . . . .

I.G. Ex. 1, at 1.

Petitioner timely filed her December 7, 2012 request for hearing (RFH) with HHS's Departmental Appeals Board, Civil Remedies Division (CRD). On January 16, 2013, I held a telephonic prehearing conference. The prehearing conference is summarized in my January 16, 2013 Order and Schedule for Filing Briefs and Documentary Evidence (Order). Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on February 21, 2013, along with nine proposed exhibits (I.G. Exs. 1-9). Petitioner subsequently filed a response letter (P. Br.) on March 30, 2013, but did not submit any proposed exhibits.[1] The I.G. filed a reply brief (I.G. Reply Br.) on April 19, 2013.

Petitioner did not object to any of the I.G.'s proposed exhibits. Therefore, I admit I.G. Exs. 1-9 into the record. The I.G. has indicated that an in-person hearing is unnecessary. I.G. Br. at 10. Petitioner did not request an in-person hearing in her response letter or state that she intended to provide direct testimony from any witness. *See* P. Br. at 1 (unnumbered). Therefore, an in-person hearing is not required. I issue this decision based on the written record.

II. Issue

Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(2). 42 C.F.R. § 1001.2007(a)(1)-(2).

III. Findings of Fact, Conclusions of Law, and Analysis[2]

The Secretary of Health and Human Services must exclude from participation in all federal health care programs "[a]ny individual or entity that has been convicted, under

[1] Petitioner sent her response to the I.G.'s counsel on March 30, 2013, but did not send a copy to the CRD. The I.G.'s counsel received the letter on April 15, 2013, and forwarded a copy of it by email to the CRD staff attorney assigned to this case. The staff attorney incorporated the electronic copy of Petitioner's response letter into the record file. The I.G. has not objected to Petitioner's response; therefore, I accept it as timely filed.

[2] My findings of fact and conclusions of law are set forth in italics and bold font as headings in this section of the decision.

Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." 42 U.S.C. § 1320a-7(a)(2).

A. The Circuit Court for Pierce County, Wisconsin, entered a guilty finding against Petitioner for intentional abuse of patients with no harm in violation of section 940.295(3)(a)(1) of the Wisconsin Statutes.

Petitioner is a registered nurse aide in Wisconsin. I.G. Exs. 5, 9. On October 14, 2011, Petitioner was charged with one count of "Intentionally Abuse Patients - No Harm," a misdemeanor offense in violation of sections 940.295(3)(a)(1) and 940.295(3)(b)(5) of the Wisconsin Statutes. I.G. Ex. 4. According to the charging document, Petitioner was "employed in an adult family home" and "intentionally abuse[d] a resident, under circumstances not causing or likely to cause bodily harm . . . ." I.G. Ex. 4. On February 24, 2012, Petitioner pled guilty to the single offense charged, and the Circuit Court entered a guilty finding against Petitioner for violating section 940.295(3)(a)(1).[3] I.G. Ex. 2; *see* RFH at 1 (acknowledging that Petitioner pled guilty). The court imposed a fine of $265.60. I.G. Ex. 2.

B. Petitioner was convicted of a criminal offense for purposes of 42 U.S.C. § 1320a-7(a)(2).

Under 42 U.S.C. § 1320a-7(a)(2), an individual must be "convicted, under Federal or State law, of a criminal offense" before the I.G. excludes him or her. The statute defines the term "convicted" to include "when there has been a finding of guilt against the individual or entity by a Federal, State, or local court" or "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court." 42 U.S.C. § 1320a-7(i)(2); *see* 42 C.F.R. § 1001.2. Here, following Petitioner's guilty plea, the Circuit Court of Pierce County, Wisconsin, entered a finding of guilt against Petitioner for intentionally abusing patients with no resulting harm. I.G. Ex. 2. Accordingly, Petitioner was "convicted" of a criminal offense within the meaning of the statute because she pled guilty to an offense for which the state court then entered a finding of guilt against her.

Petitioner now claims that she is not guilty of the underlying offense to which she pled guilty and the court entered a guilty finding. P. Br. at 1. Rather, Petitioner asserts that she did not have any money to continue contesting the criminal charge and, on the recommendation of her lawyer, agreed to plead guilty to end the criminal proceeding. P. Br. at 1; RFH at 1. Petitioner claims that the prosecutor and court used her "as an

[3] Petitioner acknowledges in her RFH that she pled guilty to the criminal offense, although the court record does not reflect a guilty plea. *See* RFH at 1; I.G. Ex. 2. The court record only contains a finding of guilt. Based on Petitioner's representation, it is reasonable to infer that the court entered its finding based on Petitioner's guilty plea.

example" and "had to give me something to appease the [victim's] parents." RFH at 1. Petitioner argues that the victim's parents are wealthy and used their wealth to influence the state criminal process against her. RFH at 2; P. Br. at 1.

By regulation, "the basis for the underlying conviction, civil judgment or determination is not reviewable and the individual . . . may not collaterally attack it either on substantive or procedural grounds in this appeal." 42 C.F.R. § 1001.2007(d). Petitioner's arguments about her actual innocence, the motivating factors for her pleading guilty, and her theory that the victim's parents orchestrated the criminal charge against her all relate to the basis for the underlying conviction, and are not reviewable by me in this case. *Id.* Accordingly, Petitioner's arguments cannot serve as a basis to reverse the exclusion.

C. Petitioner must be excluded under 42 U.S.C. § 1320a-7(a)(2) because her conviction was for an offense relating to the abuse of patients in connection with the delivery of a health care item or service.

The I.G. must exclude an individual from participation in any federal health care program if the individual was convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(2). To support the exclusion, the I.G. must establish: (1) the individual was convicted of a criminal offense; (2) the criminal offense was related to neglect or abuse of patients; and (3) the criminal offense was done in connection with the delivery of a health care item or service. As discussed above, the I.G. has shown that Petitioner was convicted of a criminal offense.

Here, Petitioner was charged with and pled guilty to abusing a patient while employed in an adult family home. I.G. Exs. 2, 4. The title of the offense for which Petitioner was convicted includes both "abuse" and "patient," sufficient to satisfy the second element needed for a mandatory exclusion under 42 U.S.C. § 1320a-7(a)(2). *See* I.G. Exs. 2, 4. However, relying on the statutory title alone is not a preferred analytical tool to determine whether the underlying acts leading to a conviction were related to the abuse of patients. *See, e.g.*, *Dewayne Franzen*, DAB No. 1165 (1990). Recognizing that principle, a review of the record here shows that Petitioner's underlying conduct was "abuse" of a "patient."

Investigators determined that Petitioner locked "J.R.," a developmentally-disabled adult, in her room for long periods by placing a loud door alarm on J.R.'s bedroom door. The alarm emitted a loud screeching sound when triggered, which investigators determined would frighten J.R. into remaining in the room.[4] I.G. Ex. 3, at 11. J.R. alleged that Petitioner "had spanked her and locked her in her room against her will and did not allow

[4] Investigators also found a door alarm on a door leading outside of the house, but determined that this alarm, unlike the bedroom door alarm, was a legitimate and authorized safety feature. I.G. Ex. 3, at 7.

her to leave." I.G. Ex. 3, at 2. The Wisconsin Department of Health Services conducted an investigation of Petitioner from August 15, 2011 through March 1, 2012. I.G. Ex. 9, at 1. The investigation focused on a report that Petitioner "intentionally spanked, hit and pulled a resident's hair and locked a resident in her room . . . ." I.G. Ex. 9, at 1. The investigation looked into the same acts that were involved in Petitioner's criminal conviction. I.G. Ex. 9, at 1. The Wisconsin Department of Health Services concluded that "there is reasonable cause to believe the incident did occur and that your conduct meets the definition of abuse in Wis[consin] Admin[istrative] Code § DHS 13.03." I.G. Ex. 9, at 1. The Wisconsin Department of Health Services currently lists Petitioner on its website as having a "Substantiated Finding of Caregiver Misconduct" based on the circumstances of this case. I.G. Exs, 5, 9.

For purposes of the I.G.'s exclusion, the regulations define a "patient" as:

> [A]ny individual who is receiving health care items or services, including any item or service provided to meet his or her physical, mental, or emotional needs or well-being (including a resident receiving care in a facility as described in part 483 of this chapter), whether or not reimbursed under Medicare, Medicaid and any other Federal health care program and regardless of the location in which such item or service is provided.

42 C.F.R. § 1001.2. Here, J.R. lived in a home and received services through REM Wisconsin, a company that provides in-home health and social care to those who are developmentally disabled, emotionally disturbed, or have mental illnesses. *See* I.G. Exs. 7, 8. Therefore, J.R. was a "patient" at the time Petitioner committed the conduct underlying her conviction.

Based on the offense to which Petitioner pled guilty, the investigation report, the findings of the Wisconsin Department of Health Services, and the nature of Petitioner's employment, I conclude that the conduct resulting in Petitioner's conviction was related to the abuse of a patient.

The final element for a mandatory exclusion under 42 U.S.C. § 1320a-7(a)(2), requires that the criminal conduct related to abuse of a patient must be "in connection with the delivery of a health care item or service." 42 U.S.C. § 1320a-7(a)(2). The regulation implementing this mandatory exclusion provision explains that the delivery of a health care item or service "includes the provision of any item or service to an individual to meet his or her physical, mental or emotional needs or well-being, whether or not reimbursed under Medicare, Medicaid or any Federal health care program." 42 C.F.R. § 1001.102(b). The record before me shows that Petitioner, while working for REM Wisconsin, provided services intended to meet the patient victim's physical, mental, or emotional needs. *See* I.G. Exs. 6, 7. Petitioner committed the abuse-related conduct that resulted in her conviction during the time intended for the provision of health-related

services to J.R. Therefore, Petitioner's conviction was for an offense related to abuse in connection with the delivery of a health care item or service. The I.G. has established the necessary elements for exclusion under 42 U.S.C. § 1320a-7(a)(2).

D. Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B).

Petitioner must be excluded for a minimum period of five years because, as discussed above, there is a basis to exclude Petitioner pursuant to the mandatory exclusion provision of the statute. 42 U.S.C. § 1320a-7(a)(2), (c)(3)(B). The five-year exclusion imposed by the I.G. is the required minimum exclusion period and cannot be reduced in these proceedings. 42 C.F.R. § 1001.2007(a)(2).

IV. Conclusion

For the foregoing reasons, I affirm the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for the statutory five-year minimum period pursuant to 42 U.S.C. § 1320a-7(a)(2).

/s/
Scott Anderson
Administrative Law Judge