Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Patsy Welshman
(OI File No.: 2-10-40173-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-593

Decision No. CR2475

Date: December 12, 2011

DECISION

Petitioner, Patsy Welshman, asks review of the Inspector General's (I.G.'s) determination to exclude her for five years from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(1) of the Social Security Act (Act). For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner and that the statute mandates a minimum five-year exclusion.

Discussion

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from program participation. Because an exclusion under section 1128(a)(1) of the Act must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

The parties have submitted briefs (I.G. Br.; P. Br.), and the I.G. filed a reply. With his brief, the I.G. submitted eight exhibits (I.G. Exs. 1-8). Petitioner submitted four exhibits (P. Exs. 1-4). In the absence of any objections, I admit into evidence I.G. Exs. 1-8 and P. Exs. 1-4.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary and, if so, to "describe the testimony it wishes to present, the names of the witnesses it would call, and a summary of each witnesses' proposed testimony." I specifically directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs and Documentary Evidence, Attachment 1 (Informal Brief of Petitioner ¶ III) and Attachment 2 (Informal Brief of I.G. ¶ III) (August 10, 2011). The I.G. indicates that an in-person hearing is not necessary. Petitioner, on the other hand, contends that an in-person hearing is necessary but also says that she has no testimony to offer. She lists no witnesses and offers no explanation as to what an in-person hearing would accomplish. P. Br. at 2-3. I therefore decline to schedule a hearing that would serve no purpose.

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

From approximately November 5, 2005 until July 4, 2006, Petitioner worked for a home health agency (HHA) in New York State. Although she had no valid state nursing license, she provided healthcare services to patients in their homes as if she were properly licensed as a licensed practical nurse or a registered nurse, and the HHA billed the Medicaid program for her "nursing services" as if they had been provided by a licensed nurse. I.G. Ex. 2; I.G. Ex. 3 at 2 (Rowe-Smith Decl. ¶¶ 4-6). In November 2008, she was indicted on one felony count of grand larceny and one felony count of unauthorized practice of nursing. I.G. Ex. 6. Pursuant to a plea agreement, dated June 15, 2009, she pled guilty in New York State Court to one misdemeanor count of criminal trespass, and the court accepted the plea. I.G. Exs. 4, 5, 7. She was ordered to pay $4,000 restitution to the State Medicaid program. I.G. Exs. 2, 4, 8.

In a letter dated May 31, 2011, the I.G. advised Petitioner that, because she had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health care program, the I.G. was excluding her from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. CMS Ex. 1. Section 1128(a)(1) of the Act authorizes such exclusion. I.G. Ex. 1.

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services exclude an individual who has been convicted under federal or state law of a criminal

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

offense related to the delivery of an item or service under Medicare or a state health care program.[2] 42 C.F.R. § 1001.101.

An offense is related to the delivery of an item or service under Medicare or a state health care program if there is "a nexus or common-sense connection" between the conduct giving rise to the offense and the delivery of the item or service. *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Berton Siegel, D.O.*, DAB No. 1467 (1994). Here, Petitioner's plea agreement and the court's judgment of conviction establish the necessary connection between her crime and the Medicaid program. In her plea agreement, she conceded that "from on or about November 5, 2005 to on or about July 4, 2006," she entered the homes of Medicaid recipients and remained there unlawfully, causing $4,000 in damages to the New York State Medicaid program. I.G. Ex. 5 at 2. She agreed to make restitution in that amount. I.G. Ex. 5 at 3; I.G. Exs. 7, 8.

Petitioner was therefore convicted of a crime related to the delivery of an item under the Medicaid program, and is subject to a minimum five-year exclusion. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Petitioner concedes that she was convicted of a criminal offense but claims that she was not convicted of an offense for which an exclusion is required, because the New York Office of the Medicaid Inspector General removed her name from the state's Disqualified Provider List. P. Br. at 1-2, 4; P. Ex. 1. She does not explain why the state took this action. But the state's action does not supersede federal law, which mandates that the I.G. exclude her from program participation.

Petitioner also suggests that she did not fully understand the implications of her plea and that she was not guilty of the crime. She says that she is a "British trained licensed Registered Nurse/Certified Midwife" and thought that she would be able to practice so long as she passed the licensing exam within a year. In this regard, she charges that the manager of the home health agency misled her. P. Br. at 5-6. Federal regulations explicitly preclude any collateral attack on Petitioner's conviction.

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it, either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380, at 8 (1993) ("There is no reason to 'unnecessarily

[2] The term "state health care program" included a state's Medicaid program. Section 1128(h)(1) of the Act; 42 C.F.R. § 1320a-7(h)(1).

encumber the exclusion process' with efforts to reexamine the fairness of state convictions."); *Young Moon, M.D.*, DAB CR1572 (2007).

I note also that, according to the June 15, 2009 court transcript, Petitioner told the state court judge that she was satisfied with the services of her attorney and that her plea was voluntary. She understood that she would receive a conditional discharge and would pay $4,000 in restitution, but that no other promises were made to her. I.G, Ex. 4 at 3-5.

Finally, Petitioner complains about the impact of the exclusion on her health and finances, points out that she has no other convictions, and that her former employer hopes to reinstate her. These factors are simply irrelevant and not bases for overturning a mandatory exclusion.

Conclusion

The I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs under section 1128(a)(1) of the Act, and the statute mandates a five-year minimum period of exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge