Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Suzanne Pindell
and
Terra S. Shepherd,

Petitioners,

v.

The Inspector General.

Docket Nos. C-14-859 and C-14-905

Decision Nos. CR3329 and CR3330

Date: August 12, 2014

DECISION

Petitioner, Suzanne Pindell, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)), effective February 20, 2014. There is a proper basis for Petitioner Pindell's exclusion based upon her conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Petitioner Pindell'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)).[1]

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioners may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

Petitioner, Terra S. Shepherd, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act (42 U.S.C. § 1320a-7(a)(1)), effective February 20, 2014. There is a proper basis for Petitioner Shepherd's exclusion based upon her conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Petitioner Shepherd'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 (I.G.) of the U.S. Department of Health and Human Services notified Petitioners by letters dated January 31, 2014, that they were being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years under section 1128(a)(1) of the Act (42 U.S.C. § 1320a-7(a)(1)). The I.G. advised Petitioners that they were being excluded based on their convictions in the Second Judicial District Court of the State of Nevada, Washoe County, of criminal offenses related to the delivery of an item or service under Medicare or a state health care program. I.G. Exhibits (Exs.) 1, 2.

Petitioners timely requested hearings on April 1, 2014. On April 25, 2014, I convened a prehearing telephone conference, the substance of which is memorialized in my Prehearing Order dated April 28, 2014. Petitioners orally requested during the prehearing conference that I consolidate the cases for hearing and decision; the I.G. did not object; and the cases were consolidated.[2] On May 27, 2014, the I.G. filed a motion for summary judgment, a brief in support of summary judgment (I.G. Br.), and I.G. Exs. 1 through 10. Petitioners filed a brief in opposition (P. Br.) on June 25, 2014, and Petitioners' Exhibits (P. Exs.) 1 through 11. The I.G. filed a reply brief (I.G. Reply) on July 9, 2014. The parties have not objected to my consideration of the offered exhibits and I.G. Exs. 1 through 10 and P. Exs. 1 through 11 are admitted as evidence.

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[2] A separate docket has been maintained for each case in the Departmental Appeals Board Electronic Filing System with duplicate filings in each, in case it became necessary to sever the cases.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioners' rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in any federal health care program any individual 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. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a).[3]

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). 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 are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that provides the basis of the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of 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).

B. Issues

The Secretary has by regulation limited my scope of review to two issues:

> Whether the I.G. has a basis for excluding an individual or entity from participating in Medicare, Medicaid, and all other federal health care programs; and

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[3] References are to the 2013 revision of the Code of Federal Regulations (C.F.R.), unless otherwise indicated.

Whether the length of the proposed exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). If the I.G. imposes the minimum period of exclusion authorized for a mandatory exclusion under section 1128(a)(1) of the Act, there is no issue of whether or not the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2).

C. Findings of Fact, Conclusion of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioners' requests for hearing were timely and I have jurisdiction.

2. Summary judgment is appropriate.

Petitioners' requests for hearing were timely filed and preserved Petitioners' rights to review of justiciable issues. I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

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 Secretary has provided by regulation that a sanctioned party has the right to hearing before an ALJ and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2-.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. Pro. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997) (holding in-person hearing is required where the 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 Ctr.*, DAB CR700 (2000).

Summary judgment is appropriate in this case. There are no genuine issues of material fact in dispute in this case. The issues raised by Petitioners are issues of law that must be resolved against Petitioners.

3. Petitioners' exclusions are required by section 1128(a)(1) of the Act.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioners' mandatory exclusions. 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.

Act § 1128(a)(1). Section 1128(a)(1) of the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs, 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. The definition of a "State health care program" includes state Medicaid plans. Act § 1128(h) (42 U.S.C. § 1320a-7(h)); 42 C.F.R. § 1001.2.

Petitioners Pindell and Shepherd, who are mother and daughter, were part owners of HealTherapy of Nevada, Inc. (HTN). HTN provided "equine-facilitated psychotherapy and experiential learning programs," including horseback riding and all aspects of horsemanship to "traumatized and disabled" youth and their families. P. Exs. 1, 2; P. Br. at 2. It is not disputed that HTN had an agreement with Nevada Medicaid to provide mental health services to Medicaid recipients and that HTN did submit claims to Nevada Medicaid for services rendered. It is not disputed that Petitioner Pindell was the President and Petitioner Shepard was the General Manager of HTN. P. Exs. 1, 7-8, 10.

On June 12, 2013, the Grand Jury of Washoe County, State of Nevada, returned an indictment against each of the Petitioners alleging: one count of submission of false Medicaid claims; one count of theft by misrepresentation; one count of intentional failure to maintain adequate records under Medicaid; and one count of obtaining and using the personal identifying information of another for unlawful purposes. I.G. Exs. 9, 10. On August 6, 2013, the Nevada Attorney General filed an "Information Supplementing

Indictment" (supplemental information) against each Petitioner alleging one count of submission of false Medicaid claims. I.G. Exs. 7, 8.

On August 7, 2013, each Petitioner agreed to enter a plea of *nolo contendere* (no contest) to the one count of submission of false Medicaid claims, a misdemeanor, as alleged in the supplemental information. Petitioners agreed to plead no contest based on the terms of the plea agreement, which included: Petitioners agreed to pay court costs; Petitioners agreed to pay restitution of $30,000 to Nevada Medicaid for which they agreed that they were jointly and severally liable; and, when restitution was paid in full, the prosecutor would recommend no incarceration and no fine, and that the charges from the grand jury would be dismissed and the case closed. The plea agreements stated that Petitioners understood that by pleading no contest they admitted that the prosecutor could prove facts necessary to establish the offenses to which Petitioners were pleading no contest. The plea agreement also specifically stated that Petitioners understood that as a consequence of their no contest pleas, they may be excluded from participating in Medicare, Medicaid and other government health care programs or facilities. I.G. Exs. 3, 4.

Petitioners' no contest pleas were accepted and judgments entered against them on August 7, 2013. The judgments state that Petitioners were guilty of the crime of submission of false Medicaid claims, a violation of Nev. Rev. Stat. § 422.540(1)(a) and (2)(b), a misdemeanor. Petitioners were sentenced to pay, jointly and severally, restitution of $30,000. The court dismissed Counts 1 through 4 of the grand jury indictment. I.G. Exs. 5, 6.

An individual is considered "convicted of a criminal offense" when a judgment of conviction has been entered by a federal, state, or local court or a plea of guilty or no contest has been accepted. Act § 1128(i) (42 U.S.C. § 1320a-7(i)). Thus, the court's judgments against Petitioners constitute a conviction and Petitioners were convicted of a criminal offense within the meaning of the Act. I also conclude that the criminal offense of which each Petitioner was convicted was related to the delivery of an item or service under a state health care program, in this case, Medicaid. Petitioners were each convicted of the offense of submission of false Medicaid claims to Nevada Medicaid. The charge to which they pleaded no contest clearly shows a nexus between their offenses and the delivery of a health care item or service under Medicare, Medicaid or another governmental health care program. Accordingly, I conclude that all elements of section 1128(a)(1) of the Act are met; there is a basis for Petitioners' exclusions; and their exclusions are mandated by the Act.

Petitioners argue that the I.G. may not rely upon Petitioners' no contest pleas because evidence of a no contest plea is not admissible as evidence in a criminal or civil proceeding pursuant to Nev. Rev. Stat. § 48.125 (2007). P. Br. at 6-7. Petitioners' argument is without merit in this forum. Petitioners' exclusions are not based upon their

no contest pleas, but rather, upon the judgments of conviction that were entered against Petitioners when their pleas were accepted. The relevant evidence is the judgments against Petitioners admitted as I.G. Exs. 5 and 6. Whether their pleas were no contest, guilty, or not guilty, has no impact the application of section 1128(a)(1) of the Act and the nature of the plea is of no real relevance. Further, Petitioners have failed to point to any authority to support an argument that the Nevada rules of evidence have any application to a federal administrative proceeding. In fact, the Nevada rules of evidence specifically provide that they govern proceedings in the Nevada courts and before Nevada magistrates. Nev. Rev. Stat. § 47.020.1 (2013). Furthermore, even the Federal Rules of Evidence are not binding upon the ALJ. 42 C.F.R. § 1005.17.

Petitioners also argue that the I.G. failed to consider the entirety of the circumstances associated with the no contest pleas. This argument is also without merit. The I.G. is required to consider whether or not the elements of section 1128(a)(1) of the Act are satisfied. If the elements are met, Congress mandates that the Secretary exclude the person or entity convicted. Congress granted the Secretary, the I.G., and me no authority to consider any other factors or to decide not to exclude when the elements of section 1128(a)(1) of the Act are met.[4]

Petitioners argue that their exclusion for five years violates the prohibition of the Eighth Amendment of the U.S. Constitution against excessive fines and cruel and unusual punishment. P. Br. 7-10. I am bound to follow the federal statutes and regulations, and have no authority to declare them unconstitutional. *Susan Malady, R.N.*, DAB No. 1816 (2002); 42 C.F.R. § 1005.4(c)(1). Although I must interpret and apply federal statutes and regulations consistent with Constitutional principles, there is no issue of interpretation for me in this case. I have no authority to address Petitioners' attack on the Act and the regulations on constitutional grounds. Petitioners have preserved the issue for appeal to the federal courts. I note, however, that their arguments have been rejected by the courts before. Exclusions imposed by the I.G. are civil sanctions, remedial in nature and not punitive and criminal. Because exclusions are remedial sanctions, they do not violate either the double jeopardy clause or the prohibition against cruel and unusual punishment. *Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir. 1992); *Greene v. Sullivan*, 731 F.Supp. 838 (E.D. Tenn. 1990); *W. Scott Harkonen, MD*, DAB No. 2485 at 22 (2012); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Douglas Schram, R.Ph.*, DAB

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[4] There is limited authority for the Secretary to waive some mandatory exclusions based on very specific facts not present in this case. Act § 1128(c)(3)(B).

No. 1372 (1992); and *Janet Wallace, L.P.N.*, DAB No. 1126 (1992).[5] Arguments that the exclusion provisions are anything but remedial have consistently been found to be without merit. *Manocchio*, 961 F.2d 1539; *Greene*, 731 F.Supp. 838.

4. The minimum period of exclusion under section 1128(a) is five years. Act § 1128(c)(3)(B).

5. Petitioners' exclusions for five years are not unreasonable as a matter of law.

I have concluded that there is a basis to exclude Petitioners pursuant to section 1128(a)(1) of the Act. Therefore, the I.G. must exclude Petitioners for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period and I may not reduce the period of exclusion below five years.

Petitioners submitted several letters expressing support for Petitioners and attesting to the quality and effectiveness of their services. P. Ex. 4. I read the letters with interest, but I am unable to reduce the period of exclusion below five years, which is the minimum period authorized. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

III. Conclusion

For the foregoing reasons, Petitioners are excluded from participating in Medicare, Medicaid, and all federal health care programs for the statutory five-year minimum period, effective February 20, 2014.

/s/
Keith W. Sickendick
Administrative Law Judge

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[5] The exclusion remedy serves twin congressional purposes: the protection of federal funds and program beneficiaries from untrustworthy individuals and the deterrence of health care fraud. S. Rep. No. 100-109, at 1-2 (1987), reprinted in 1987 U.S.C.C.A.N. 682, 686 ("clear and strong deterrent"); *Joann Fletcher Cash*, DAB No. 1725 at 18 (discussing trustworthiness and deterrence).