Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Linda Kittle,
(O.I. File Number H-13-42745-9),

Petitioner,

v.

The Inspector General,

Respondent.

Docket No. C-14-1592

Decision No. CR3534

Date: December 24, 2014

DECISION

Petitioner, Linda Kittle, is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(3) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(3)), effective June 19, 2014. 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)).[1]

I. Background

The Inspector General of the Department of Health and Human Services (I.G.) notified Petitioner by letter dated May 30, 2014, that she was being excluded from participation in

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

Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(3) of the Act. The basis for Petitioner's exclusion is her felony conviction in the Circuit Court of Bolivar County, Mississippi, of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary duty, or other financial misconduct in connection with the delivery of a health care item or service, or with respect to any act or omission in a health care program (other than Medicare and a state health care program) operated by or financed in whole or in part by, any federal state, or local government agency. I.G. Exhibit (Ex.) 1.

Petitioner timely requested a hearing (RFH) on July 29, 2014. Petitioner filed three exhibits with her RFH (RFH Exs.): RFH Ex. A, the I.G.'s May 30, 2014 notice of exclusion letter; RFH Ex. B, a Non-Adjudication Order from her criminal proceedings; and RFH Ex. C, Petitioner's affidavit.[2] The case was assigned to me on August 1, 2014, for hearing and decision. On August 21, 2014, I convened a prehearing conference by telephone, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued on August 21, 2014. Petitioner did not waive an oral hearing. The I.G. requested to file a motion for summary judgment prior to further development of the case for hearing and I set a briefing schedule.

On September 22, 2014, the I.G. filed a motion for summary judgment and supporting brief with I.G. Exs. 1 through 4. On October 22, 2014, Petitioner filed a response in opposition to the I.G.'s motion for summary judgment with a supporting memorandum (P. Br.) and P. Exs. 1 through 4.[3] The I.G. filed a reply brief (I.G. Reply) on November 4, 2014.

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[2] RFH Ex. A is the I.G. notice of exclusion that has also been submitted as I.G. Ex. 1. RFH Ex. B is the Non-Adjudication Order also submitted as I.G. Ex. 4. RFH Ex. C is Petitioner's affidavit dated July 29, 2014. References in this decision are to the I.G.'s or Petitioner's exhibits rather to the exhibits submitted with the RFH.

[3] Petitioner's memorandum in support of its opposition to the motion for summary judgment was marked and submitted as P. Ex. 4 pages 1 through 9. P. Ex. 4, pages 10 and 11, is a copy of the May 30, 2014 I.G. notice of exclusion also offered as I.G. Ex. 1. P. Ex. 4, pages 12 through 14, is Petitioner's affidavit dated October 16, 2014; P. Ex. 4, pages 15 and 16, is the affidavit of Charles Brock, M.D., dated October 16, 2014, which is also offered as P. Ex. 2. P. Ex. 4, pages 17 and 18, is the affidavit of Steven Clark, M.D., dated October 16, 2014, which is also offered as P. Ex. 3. Petitioner's memorandum marked as P. Ex. 4, pages 1 through 9, is argument in support of Petitioner's position and not evidence. The remainder of P. Ex. 4 is evidence. References to Petitioner's memorandum are to P. Br. at the appropriate page number.
(Footnote continued next page.)

Petitioner objected to I.G. Exs. 1 through 4 as hearsay and not self-authenticating documents. P. Br. at 4. Petitioner's objections are overruled. I am not bound in this proceeding by the Federal Rules of Evidence (Fed. R. Evid.). 42. C.F.R. § 1005.17(b). Evidence that is authentic and relevant is admissible; immaterial, irrelevant, privileged, and unduly prejudicial material is subject to exclusion. 42 C.F.R. § 1005.17(c)-(g). I.G. Ex. 1 is the I.G. notice of exclusion which was also submitted as RFH Ex. A and P. Ex. 4 at 10-11. Not only did Petitioner waive any objection to I.G. Ex. 1 by offering the document herself, the notice of exclusion fits the exception to the rule against hearsay established by Fed. R. Evid. 803(8)(A)(iii). I.G. Ex. 2 is the indictment against Petitioner that is signed by both the foreman of the grand jury and the circuit court/deputy clerk, witnessed, and has the court seal on it. I.G. Ex. 2 is self-authenticating under Fed. R. Evid. 901(7) and it is relevant as it sets forth the charge against Petitioner. Petitioner also admitted to Count 2 set out in I.G. Ex. 2 by entering a guilty plea. I.G. Ex. 3. I.G. Ex. 3 is self-authenticating under Fed. R. Evid. 901(7) and it is a statement of Petitioner and as such is not hearsay. Fed. R. Evid. 801 (d)(2)(A)-(B). I.G. Ex. 4, the non-adjudication order in Petitioner's case, is self-authenticating under Fed. R. Evid. 901(7); Petitioner waived any objection by offering a copy of the same order as RFH Ex. B; and the document fits the hearsay exception of Fed. R. Evid. 803(22). The I.G. argues that the affidavits offered as P. Exs. 2 and 3 and included in P. Ex. 4 are irrelevant and should be given no weight. I.G. Reply at 4. Petitioner's affidavits (RFH Ex. C and P. Ex. 4 at 12-14) are clearly relevant. The physician affidavits offered as P. Ex. 2, P. Ex. 3, and P. Ex. 4 at 15-18 are not relevant to any issue I may decide and are not admissible as evidence in this proceeding and must be excluded. 42 C.F.R. § 1005.17(c). I.G. Exs. 1 through 4; P. Exs. 1 and 4, except P. Ex. 4 at 15-18; and RFH Exs. A, B, and C are all admitted despite the fact that some of the documents are cumulative.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's 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)(3) of the Act, the Secretary must exclude from participation in any federal health care program:

(Footnote continued.)

The evidentiary portion of P. Ex. 4 is referred to as P. Ex. 4 at the appropriate page number.

> Any individual or entity that has been convicted for an offense which occurred after . . . [August 21, 1996], under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in [section 1128(a)(1)] operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(c).

Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; or when there has been a finding of guilt in a federal, state, or local court; or when a plea of guilty or no contest has been accepted in a federal, state, or local court; or when an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. 42 U.S.C. § 1320a-7(i)(1)-(4); 42 C.F.R. § 1001.2.

An exclusion imposed under section 1128(a) will be for a period of not less than five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a). The period of exclusion may be extended based on the presence of specified aggravating factors. 42 C.F.R. § 1001.102(b). 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 in a hearing before an ALJ is a preponderance of the evidence. 42 C.F.R. § 1001.2007(c). Petitioner may not collaterally attack the conviction that provides the basis for the exclusion. 42 C.F.R. § 1001.2007(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 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). If the I.G. imposes the minimum authorized five-year period for exclusion under section 1128(a) of the Act, there is no issue as of whether or not the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2).

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

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

1. Petitioner's request for hearing was timely, and I have jurisdiction.

2. Summary judgment is appropriate in this case.

There is no dispute that Petitioner timely requested a hearing and that 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. Deciding a case on summary judgment differs from deciding a case on the merits after a hearing. An ALJ does not assess credibility or weigh conflicting evidence when deciding a case on summary judgment. *Bartley Healthcare Nursing and Rehab.*, DAB No. 2539 at 2-3 (2013); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010); *Holy Cross Village at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009); *see* Fed. R. Civ. Pro. 56.

Petitioner argues that the facts used as the basis for her conviction are incorrect. Petitioner is attempting to collaterally attack her conviction. However, if exclusion is based on a conviction, the conviction is not subject to collateral attack in this forum either on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d). Petitioner does not

dispute that: she was convicted within the meaning of section 1128(i) of the Act; she pled guilty to the crimes alleged in the two-count indictment; she was convicted of obtaining a controlled substance by means of fraud, misrepresentation or subterfuge; and her conviction occurred after August 21, 1996. RFH; P. Br. at 2. Petitioner opposes summary judgment arguing that there are material facts in dispute regarding whether or not her conviction was related to the delivery of a health care item or service. P. Br. at 2, 6. I conclude that summary judgment is appropriate as there are no genuine disputes as to any material facts related to the nexus issue, as more fully discussed hereafter. The I.G. prevails as a matter of law on the issue of whether there is a basis for exclusion based on the facts conceded by Petitioner. The five-year period of exclusion is not unreasonable as a matter of law, because the period is the minimum authorized by Congress for exclusion pursuant to section 1128(a) of the Act.

3. Petitioner's exclusion is required by section 1128(a)(3) of the Act.

a. Facts

Petitioner was a registered nurse at Grace Community Hospice in Mississippi. P. Ex. 4 at 12; RFH Ex. C; I.G. Ex. 2. On April 15, 2013, in the Circuit Court of the Second Judicial District of Bolivar County, Mississippi, Petitioner pled guilty to two felony counts of obtaining a controlled substance on September 16 and 22, 2011, by means of fraud, misrepresentation or subterfuge, in violation of Miss. Code Ann. § 41-29-144 (1972) as alleged in the two count indictment. I.G. Exs. 3, 4; RFH Ex. B. On July 24, 2014, the Circuit Court judge withheld acceptance of Petitioner's plea and adjudication of guilt and placed her in a non-adjudication program for a period of three years. I.G. Ex. 4; RFH Exs. B, C; P. Br. at 2-3. Petitioner admitted by her guilty pleas two instances of unlawfully obtaining possession of 60 tablets of oxycodone that had been prescribed for a patient in the hospice where she worked. I.G. Exs. 2, 3, 4; RFH Ex. B. Petitioner obtained the prescriptions in the name of the patient and filled the prescriptions at the South Street Pharmacy in Cleveland, Mississippi. Petitioner then retained possession of the tablets of oxycodone in each instance and converted the oxycodone to her own use. I.G. Ex. 2; P. Ex. 4 at 12-13; P. Br. at 1-2.

b. Analysis

The elements necessary for exclusion pursuant to section 1128(a)(3) of the Act are derived from the language of that section. The I.G. is required to exclude an individual or entity pursuant to section 1128(a)(3) of the Act when the following elements are satisfied:

> 1. The individual or entity was convicted for an offense under federal or state law;

> 2. The offense occurred after August 21, 1996 (the date of enactment of the Health Insurance Portability and Accountability Act of 1996);
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> 3. The offense was committed in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in section 1128(a)(1) of the Act, i.e. Medicare and Medicaid) operated by or financed in whole or in part by any federal, state, or local government agency;
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> 4. The crime was a felony offense; and
>
> 5. The offense was related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

All the elements are satisfied in this case. Petitioner does not dispute that she was convicted of offenses under state law within the meaning of section 1128(i) of the Act when she entered a plea of guilty on April 15, 2013, and the judge withheld acceptance of her plea and adjudication of guilt and placed her in a non-adjudication program for three years. I.G. Exs. 2, 3, 4. Petitioner does not dispute that the offenses of which she was convicted were committed after August 21, 1996. Petitioner does not dispute that she was convicted of felony offenses. Petitioner does not dispute that she was convicted of offenses that involved fraud, misrepresentation or subterfuge. The only element that Petitioner disputes is whether or not her offenses were connected with the delivery of a health care item or service. P. Br. at 2-3, 5. I conclude that the undisputed facts establish the required connection, rational link, or nexus between Petitioner's criminal offenses and the delivery of a health care item or service.

My decision is guided by the decision of the Departmental Appeals Board (the Board) in *W. Scott Harkonen, M.D.*, DAB No. 2485 (2012), *aff'd, Harkonen v. Sebelius,* No. C13-0071 PJH, 2013 WL 5734918 (N.D. Cal. Oct. 22, 2013). In *Harkonen*, an appellate panel of the Board discussed in detail the element of section 1128(a)(3) of the Act which requires that the offense of which one is convicted have been committed in connection with the delivery of a health care item or service. The Board discusses that in prior cases it has interpreted the language "in connection with" to require a common sense connection or nexus, also characterized as a "rational link," between the criminal offense and the delivery of a health care item or service. *Harkonen* at 7. The Board notes that in *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004), it found the required nexus in a case where a pharmacist, in the guise of performing his professional duties, took controlled substances for his own use. *Harkonen* at 7. In *Kenneth M. Behr*, DAB No. 1997 (2005), the Board found the nexus where a pharmacist who had access to drugs due to his position attempted to embezzle those drugs, rejecting the argument that the underlying

criminal offense must involve actual delivery of a health care item or service. *Harkonen* at 8. In *Ellen L. Morand*, DAB No. 2436 (2012), the Board concluded that the petitioner's theft from the evening deposit of the pharmacy that employed her had the requisite nexus considering that the evening deposit included revenue from the sale of health care items and that the Petitioner diverted those funds to her use. The Board summarized its prior holdings to be that "frauds or thefts that are linked in a rational way to the delivery of a health care item or service do fall within the ambit" of section 1128(a)(3). *Harkonen* at 8. The Board further notes that its interpretation is consistent with the interpretation of similar language found in section 1128(a)(1). The Board points out that its interpretations of the language of section 1128(a) "effectuate the twin purposes of section 1128(a): 1) to protect federal health care programs and their beneficiaries from individuals who have been shown to be untrustworthy; and 2) to deter health care fraud." *Id.* at 9 (citations omitted). In *Harkonen*, the Board states that section 1128(a)(3) does not require proof of an actual impact or effect upon the delivery of a health care item or service, rather, the ALJ must consider all the evidence of circumstances underlying the criminal offense, including evidence extrinsic to the criminal proceedings if reliable and credible, to find the rational link between the criminal offense and the delivery of a health care item or service. *Id.* at 10.

In this case the undisputed facts establish the rational link, that is, the nexus, between Petitioner's criminal offenses and the delivery of a health care item or service. The facts admitted by Petitioner that establish the nexus between Petitioner's offenses of obtaining a controlled substance by means of fraud, misrepresentation or subterfuge in the context of her employment and the delivery of a health care item or service are:

1. Petitioner was a registered nurse. P. Br. at 1-2; P. Ex. 4 at 12; I.G. Ex. 2.

2. At the time of her offenses in September 2011, Petitioner was employed as a registered nurse with Grace Community Hospice. P. Br. at 1-2; P. Ex. 4 at 2; I.G. Ex. 2.

3. Due to her employment as a registered nurse, Petitioner had possession of a blank physician signed prescription pad; she added the name of a home health patient of Grace Community Hospice; she filled the prescriptions at South Street Pharmacy in Cleveland under the guise that it was part of her official duties; and, when she received the oxycodone, she did not deliver it to anyone for which it was prescribed but retained possession and ultimately used it herself. P. Br. at 2; P. Ex. 4 at 12-13; I.G. Exs. 2, 3.

The foregoing facts establish the rational link between Petitioner's criminal offenses and the delivery of a health care item or service, because they also show that Petitioner used her position as a registered nurse to perpetrate her crimes. Thus, it is consistent with the purposes of section 1128(a)(3) to apply that section to exclude Petitioner to protect

federal health care programs and their beneficiaries from Petitioner, who is shown to be untrustworthy based on the abuse of her position to commit fraud in the context of her employment.

Petitioner asserts that her crimes did not cause direct harm to any health care program (RFH; P. Br. at 2); the oxycodone she obtained was not ordered for any of her patients (P. Br. at 2; P. Ex. 4 at 13); she paid for the oxycodone with her own personal funds and the oxycodone was not charged to any of her own patients in a Medicare, Medicaid or any federally funded health care program (RFH; P. Br. at 2; P. Ex. 4 at 12); no patient ever went without their medications or treatments as a result of her actions (P. Br. at 2; P. Ex. 4 at 12); the patient whose name was used on the prescriptions was not Petitioner's patient (P. Br. at 2; P. Ex. 4 at 12); and Petitioner never prevented the delivery of a prescribed drug or health care item to any of her patients or any patient at Grace Community Hospice (P. Br. at 6; P. Ex. 4 at 12). Even if I accepted these assertions as true for purposes of summary judgment, these facts do not rebut or negate the nexus between Petitioner's crimes and the delivery of a health care item or service, which is established by the admitted facts that show she used her position as a nurse to obtain the oxycodone.

Petitioner argues that exclusion under section 1128(a)(3) is only applicable to convictions concerning financial misconduct. RFH at 2. Petitioner asserts that Petitioner's actions that were the basis on her conviction are not related to any type of financial misconduct as contemplated by section 1128(a)(3) and there is no basis for her exclusion. Petitioner is in error. The term fraud as used in section 1128(a)(3) of the Act is not limited to financial misconduct. *Breton Lee Morgan, M.D.*, DAB No. 2264 (2009).

Petitioner argues that I must consider whether, if she is allowed to continue to participate in federal health care programs, she would threaten beneficiaries of those programs. She claims she has worked in the health care field for 40 years. She has successfully completed detoxification. She submitted affidavits of two physicians who oversaw her detoxification program and outpatient treatment. The physicians attest that Petitioner poses no threat to the health care community, federal or state health care programs or any of the beneficiaries of those programs. P. Exs. 2, 3. Petitioner's exclusion is mandatory and the assertions made in the physicians' affidavits, even if true, are irrelevant to whether there is a legal basis for Petitioner's exclusion.

I conclude that the elements of section 1128(a)(3) of the Act are satisfied, including the required nexus between Petitioner's criminal offenses and the delivery of a health care item or service. Accordingly, I conclude that there is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act.

4. Petitioner's exclusion for five years is not unreasonable as a matter of law.

I have concluded that there is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act, and the five-year exclusion is not unreasonable as a matter of law. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

Exclusion is effective 20 days from the date of the I.G.'s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b). The Secretary's regulations do not give me discretion to change the effective date of Petitioner's exclusion and I may not refuse to follow the Secretary's regulations. 42 C.F.R. § 1005.4(c)(1); *Thomas Edward Musial, R.Ph.*, DAB No. 1991 (2005). Consequently, the effective date of Petitioner's exclusion is June 19, 2014, twenty days after the I.G.'s May 30, 2014 notice of exclusion.

III. Conclusion

For all of the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years, effective June 19, 2014.

/s/
Keith W. Sickendick
Administrative Law Judge