Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	Date: January 23, 2009
Kim J. Rayborn,	)	
Petitioner,	)	Docket No. C-08-581
	)	Decision No. CR1891
v.	)	
The Inspector General.	)	

DECISION

Petitioner, Kim J. Rayborn, is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(2) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(2)), effective June 19, 2008, for the minimum statutory period of five years.[1]

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated May 30, 2008, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(2) of the Act. The I.G. cited as the basis for Petitioner's exclusion her conviction in the 27th Judicial District, Laurel District, Division II, Commonwealth of Kentucky, of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service.

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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.

Petitioner requested a hearing by letter dated June 27, 2008. The case was assigned to me on July 23, 2008. I held a prehearing conference in the case on August 19, 2008, the substance of which is memorialized in my Order of that date. During the conference, Petitioner declined to waive her right to an oral hearing, and the I.G. requested the opportunity to file a motion for summary judgment prior to further case development. Petitioner's objection to proceeding on summary judgment prior to further case development was overruled and a briefing schedule was set. On October 3, 2008, the I.G. filed its motion for summary judgment, supporting brief (I.G. Brief) and exhibits (I.G. Ex.) 1 through 5. Petitioner filed its opposition to the I.G. motion for summary judgment (P. Brief) with exhibits (P. Ex.) 1 through 3 on December 2, 2008. CMS filed a reply brief on December 17, 2008 (CMS Reply). No objection has been made to my consideration of any of the offered exhibits and I.G. Exs. 1 through 5 and P. Exs. 1 through 3 are admitted as evidence.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the parties' pleadings and the exhibits submitted.

1. On November 13, 2007, Petitioner pled guilty to one count of a violation of KY. REV. STAT. § 209.990(4), a Class A misdemeanor, in the 27th Judicial District, Laurel District, Division II, Commonwealth of Kentucky. I.G. Ex. 5.

2. Petitioner's guilty plea was accepted on November 13, 2007, and she was sentenced to "12 months to be diverted for a period of one year, with no time to serve," on certain specified conditions, and she was barred for one year from providing direct caring of vulnerable adults. I.G. Ex. 5.

3. KY. REV. STAT. § 209.990(4) provides that "[a]ny person who recklessly abuses or neglects an adult is guilty of a Class A misdemeanor."

4. Petitioner agreed in her plea agreement that on or about August 1, 2006, she "neglected . . . a mentally retarded cancer patient, by failing to adequately monitor her pain medication prescription." I.G. Ex. 4, at 4.

5. Petitioner does not dispute that on or about August 1, 2006, when she neglected the mentally retarded cancer patient, she was a caretaker and case manager at New Foundations, a facility for the care of individuals with disabilities and that the cancer patient was a resident at New Foundations and subject to Petitioner's care. I.G. Brief at 3; P. Brief at 2.

6. On November 25, 2008, an Agreed Order was entered on the docket of the 27th Judicial District, Laurel District, Division II, Commonwealth of Kentucky, that provided that the charge against Petitioner was "diverted and dismissed" and "shall not constitute a criminal conviction." P. Ex. 1, at 1.

B. Conclusions of Law

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

2. Summary judgment is appropriate.

3. Petitioner was convicted within the meaning of section 1128(i) (42 U.S.C. § 1320a-7(i)) of the Act.

4. Petitioner's conviction is related to the neglect of a patient in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

5. Petitioner's exclusion is mandated by section 1128(a)(2) of the Act.

6. A five-year exclusion is mandatory pursuant to section 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)) of the Act.

7. Exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b).

C. Applicable Law

Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (Secretary) is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)).

Pursuant to section 1128(a)(2) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs "(a)ny individual or entity that has been convicted, under 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." One is convicted of a criminal offense when a judgment of conviction is entered against an individual or entity by a state or federal court, regardless of whether there is an appeal pending or the judgment of conviction or other record is ultimately expunged; or when there is a finding of guilt; or when a plea of guilty or no contest is accepted; or when the individual or entity enters a first offender, deferred adjudication, or similar arrangement where a judgment of conviction is withheld. Act § 1128(i).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years.

An excluded entity is entitled to reasonable notice and an opportunity for hearing under section 205(b) of the Act. 42 U.S.C. § 1320a-7(f)(2).

D. Issues

The Secretary has by regulation limited my scope of review to two issues in a case where exclusion is based on section 1128(a)(2) of the Act:

1. Whether there is a basis for the imposition of the exclusion; and

2. Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). The I.G. has excluded Petitioner for the minimum mandatory period in this case and the only issue for my consideration is whether there is a basis for the imposition of the exclusion.

E. Analysis

1. Summary judgment is appropriate.

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 right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified in 42 C.F.R. § 1005.3. 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 is no genuine dispute of material fact and the only questions that must be decided involve application of law to the undisputed facts; or, the moving party must prevail 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. *E.g.*, Fed. R. Civ. P. 56(c); *Garden City Medical Clinic*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC*, *Inc.*, DAB CR672 (2000); *New Life Plus Center*, *CMHC*, DAB CR700 (2000).

Contrary to the assertion of Petitioner, there are no genuine issues of material fact in dispute. Petitioner does not dispute that she was convicted of neglecting a patient in her care. Rather, she argues that her criminal conviction no longer constitutes a criminal conviction (P. Brief at 2-3), that the I.G. should be bound by her plea agreement (P. Brief at 3), that her criminal conduct did not involve "the delivery of a healthcare item or service" within the meaning of section 1128(a)(2) (P. Brief at 3-4), that summary judgment should be denied because she deserves a hearing, and that Petitioner has been deprived of due process. The issue of whether Petitioner's criminal conduct involved the delivery of a health care item or service appears, at first blush, to be a fact issue. However, as discussed hereafter, Petitioner's argument is that the statutory language does not cover an offense involving the "nondelivery" or a failure to deliver a healthcare item or service. P. Brief at 3-4. The facts necessary to my decision are either admitted or not disputed, resolution of the issues involves application of law to undisputed facts or interpretation of law, and summary judgment is appropriate.

2. Petitioner was convicted within the meaning of section 1128(i) of the Act.

Petitioner argues that she no longer has a conviction within the meaning of section 1128(a) of the Act because an order was issued by the Kentucky trial court that provided that the charge against Petitioner was "diverted and dismissed" and "shall not constitute a criminal conviction." P. Ex. 1, at 1; P. Brief at 2-3. Petitioner's argument is not persuasive. A person is "convicted" for purposes of sections 1128(a) and (b): (1) when a judgment of conviction is entered by a state, federal, or local court, even though an appeal may still be pending or the record of the conviction has been expunged; (2) when there has been a finding of guilt by a court; (3) when a plea of guilt or no contest is accepted by a court; or (4) when a judgment of conviction is withheld under a first offender, deferred

adjudication, or other arrangement. Act § 1128(i); *Henry L. Gupton*, DAB No. 2058 (2007), *and ruling on reconsideration*, Ruling No. 2007-1 (2007). Federal law, not state law, provides the definition for "conviction" in this case. *Travers v. Shalala*, 20 F.3d 993, 996 (9th Cir. 1994).

Petitioner does not dispute that she pled guilty and her guilty plea was accepted by the Kentucky court. Therefore, she was convicted within the meaning of sections 1128(a) and 1128(i) of the Act. The fact that the Kentucky trial court subsequently expunged the record is not controlling in a case involving an exclusion pursuant to section 1128(a) or (b) of the Act.[2]

3. Petitioner's plea agreement does not protect her from mandatory exclusion pursuant to section 1128(a)(2) of the Act.

The criminal complaint against Petitioner was signed and sworn by Agent John Dudinskie, of the Medicaid Fraud & Abuse Control Division, Commonwealth of Kentucky, Office of the Attorney General. I.G. Ex. 3; P. Ex. 2. Petitioner argues that Agent Dudinskie was "an agent of Medicaid and thus the Federal Government is bound to the one year exclusion of [Petitioner] from the care of adults as stated in the Plea Agreement." P. Brief at 3. Petitioner asserts that Agent Dudinskie was an agent for Medicaid in negotiating Petitioner's plea agreement. P. Brief at 3.

Even if I accept for purposes of summary judgment that Agent Dudinskie was involved in negotiating the plea agreement with Petitioner, Petitioner's argument is meritless. Agent Dudinskie's business card reflects that he was an employee of the Commonwealth of Kentucky, not the United States (P. Ex. 2); Medicaid is a program administered by the state, not the federal government; Petitioner was prosecuted by the Commonwealth of Kentucky, not the federal government (I.G. Exs. 3-5; P. Ex. 1); and Petitioner's plea agreement was with the Commonwealth of Kentucky, not the United States (I.G. Ex. 4, at 4). There is no evidence that suggests that federal agents had any involvement in the

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[2] Petitioner did not object to the admissibility of I.G. Exs. 3 through 5, and Petitioner offered P. Ex. 1, all documents related to her conviction. However, based upon KY. REV. STAT. § 533.258(3), Petitioner notes that she does not consent "to the use of pretrial diversion records . . . against her here." P. Brief at 2. If the Kentucky statute has any application in this proceeding, I conclude that Petitioner waived the application of the provision of the Kentucky statute or constructively consented to the admission of any and all records related to her conviction by requesting a hearing, subject only to objections based upon authenticity and relevance of the evidence.

investigation or prosecution of Petitioner, there is no evidence that any representative of the United States was involved in Petitioner's plea agreement, and there is no evidence that the United States was a party to Petitioner's plea agreement. Petitioner argues that plea agreements must be interpreted according to contract principles and that prosecutors cannot breach plea agreements. P. Brief at 3. While the general rules Petitioner states may be correct, Petitioner nevertheless cannot prevail on this theory as a matter of law because there is no evidence from which to draw an inference that the federal government was a party to Petitioner's plea agreement. Because the United States was not a party to Petitioner's plea agreement, its agents are not bound by the agreement terms.

Petitioner's plea agreement provided that the court could impose a one-year ban on Petitioner taking direct care of vulnerable adults. I.G. Ex. 4, at 4. Her plea agreement said nothing about the status of any license to deliver health care issued by the Commonwealth of Kentucky. Petitioner's plea agreement also included no provision related to her participation in Medicare, Medicaid, or other federal health care programs. Not only is Petitioner's plea agreement silent about her license and participation, Petitioner cites no authority for the proposition that the court by which she was convicted had any authority to accept a plea agreement that included such provisions.

The I.G. argues that Petitioner's exclusion was mandatory pursuant to section 1128(a)(2) of the Act for a minimum period of five years and the I.G. had no discretion to do otherwise. I.G. Reply at 4. I concur with the I.G.'s interpretation. If Petitioner's conviction meets the requirements of section 1128(a)(2), then Congress mandated her exclusion for the minimum period of five years. The I.G., the Secretary, and I have no discretion to do otherwise, and Petitioner has cited no authority for the proposition that the provisions of a plea agreement, even if negotiated with an agent of the United States, could affect the mandate of Congress.

4. Petitioner's criminal conduct of neglecting a patient by failing to monitor the patient's pain medication prescription was a failure to deliver a health care item or service and is within the scope of section 1128(a)(2) of the Act.

Petitioner argues that her criminal conduct did not involve the delivery of a health care item or service; rather, it involved the "non-delivery" of an item or service. P. Brief at 3. This argument verges on being frivolous. Petitioner admitted by her guilty plea that she neglected "a mentally retarded cancer patient by failing to adequately monitor her pain medication prescription." I.G. Ex. 4, at 4. Petitioner thus admitted that the cancer patient was her patient, that she had some duty to monitor her patient's pain medication, and that she failed or neglected to monitor the pain medication prescription as she was required to

do. Petitioner cannot now allege before me that the cancer patient was not her patient or that she had no duty or obligation to deliver the healthcare service of administering and monitoring the patient's pain medication because collateral attack of her conviction is prohibited. 42 C.F.R. § 1001.2007(d). Similarly, Petitioner cannot now allege new facts, i.e. that the basis for the conviction was failure to deliver pain medication. Petitioner admitted by her plea that she failed to deliver the health care service of monitoring her patient's pain medication prescription and the evidence shows that she was convicted for that conduct. Accordingly, I conclude that the elements of section 1128(a)(2) of the Act are satisfied and that Petitioner's exclusion is mandatory.[3]

Petitioner also argues that the evidence does not show that Petitioner "received Federal funds either through Medicare or Medicaid," and that her exclusion is not mandatory but should be permissive under section 1128(b) of the Act because her's is a minor crime. P. Brief at 3-4. Petitioner's arguments are not persuasive. Section 1128(a)(2) of the Act requires the exclusion from participation in federal health care programs of any individual or entity (1) convicted under state or federal law, (2) of a criminal offense relating to neglect or abuse of a patient, (3) in connection with the delivery of a health care item or service. Section 1128(a)(2) does not include an element that the individual or entity to be excluded either received or claimed payment of funds from a federal source. 42 C.F.R. § 1001.101(b). Section 1128(a)(2) does not include an element that requires the conviction be for a felony rather than a misdemeanor offense. Section 1128(a)(2) also does not require that the patient neglected or abused be Medicare or Medicaid-eligible. Petitioner was convicted by a state court of a criminal offense of neglect of a patient by failure to monitor pain medication. The undisputed facts satisfy the elements of section 1128(a)(2) of the Act, and there is a basis for Petitioner's mandatory exclusion.

5. Petitioner has not been deprived of due process.

Petitioner argues that summary judgment should be denied because Petitioner deserves the right to a hearing "to assert that the exclusion imposed against her here is a violation of her Due Process Rights under the Fifth and Fourteenth Amendment of the United States Constitution." P. Brief at 4. She asserts that the I.G. action violates her substantive and procedural due process rights to enter the type of employment she chooses. P. Brief at 4.

[3] Even if the conduct for which Petitioner was convicted was her failure to give medication, Petitioner has cited no authority to support her argument that such neglect is not within the scope of section 1128(a)(2).

In this case, Petitioner has been accorded her due process right to notice and to ALJ review. Summary judgment is appropriate in this case and no hearing is required to satisfy Petitioner's right to procedural due process for the reasons already discussed. The correspondence forwarding this decision to Petitioner advises of her further due process rights. Furthermore, the federal courts have rejected claims that the Secretary's exclusion procedures amount to a deprivation of due process, finding no constitutionally-protected property or liberty interests. *Rodabaugh v. Sullivan*, 943 F.2d 855 (8th Cir. 1991); *Lavapies v. Bowen*, 883 F.2d 465 (6th Cir. 1989); *Hillman Rehabilitation Center v. U.S. Dept. of Health and Human Services*, No. 98-3789 (GEB), slip op. at 16, 1999 WL 34813783, at *16 (D.N.J. May 13, 1999); *Travers v. Sullivan*, 801 F.Supp. 394, 404-05 (E.D. Wash. 1992), *aff'd, Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994). Finally, I note that Petitioner's exclusion does not prohibit her from engaging in any employment; rather, it precludes her from participation in Medicare, Medicaid, and all federal health care programs and payment for her services through those programs.

6. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years.

The minimum period of exclusion pursuant to section 1128(a) of the Act is five years as mandated by section 1128(c)(3)(B). I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a)(2), and the minimum period of exclusion is thus five years.

III. Conclusion

There is a basis for exclusion and five years is the minimum period of exclusion authorized by law.

/s/
Keith W. Sickendick
Administrative Law Judge