Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Margally Samy,

Petitioner

v.

The Inspector General.

Docket No. C-11-459

Decision No. CR2489

Date: January 13, 2012

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner Margally Samy from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s Motion and determination are based on section 1128(a)(2) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(2), and arise from Petitioner's conviction of an offense relating to patient neglect or abuse. As I shall explain below, the undisputed facts in this case require the imposition of the five-year exclusion. I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

In March 2010, Petitioner Margally Samy was employed as a Certified Nurse Aide (CNA) at a facility in North Easton, Massachusetts called Southeast Rehabilitation & Skilled Care Center (SRSCC). On March 15, 2010, she was providing personal care services to a 92-year-old male hospice patient and resident of the facility. The resident, whose diagnoses included dementia and behavioral disturbances, became combative. A brief struggle ensued, during which Petitioner struck the resident with her closed right fist. I.G. Ex. 3.

The facility reported the incident to state authorities, who conducted an investigation and eventually filed a charge of Assault and Battery on an Elderly or Disabled Person against Petitioner, based on MASS. GEN. LAWS. ch. 265 § 13K(a1/2). I. G. Exs. 3, 4.

On or about December 14, 2010, Petitioner was convicted of the charge following a jury trial on her plea of not guilty. She was sentenced to a one-year term of probation, and as part of that sentence was ordered "not to work with elderly or disabled" during that term. I.G. Ex. 5.

Section 1128(a)(2) of the Act dictates the mandatory exclusion, for a term of not less than five years, of "[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." The I.G. notified Petitioner of her exclusion for the mandatory minimum period of five years on April 29, 2011.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action on May 10, 2011. I scheduled a telephone prehearing conference pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and the procedures best suited for addressing them, but was unable to proceed in that way because no translator was available to assist Petitioner, whose first language is not English but Haitian Creole. In lieu of the telephone conference, I explained the nature of these proceedings and Petitioner's rights and obligations in writing, and established a schedule for the submission of documents and briefs. The details are set out in my Order of June 7, 2011. Under the terms of my Orders of September 20 and October 28, 2011, briefing is now complete, and for purposes of 42 C.F.R. § 1005.20(c) the record closed January 9, 2012.

There are eleven exhibits in this case. The I.G. has proffered I.G.'s Exhibits 1-5 (I.G. Exs. 1-5), and they are admitted. I have treated Petitioner's proffer of exhibits as made up of the six documents identified in my Order of October 28, 2011, and have numbered them accordingly as Petitioner's Exhibits 1-6 (P. Exs. 1-6), to which no objection has been made by the I.G. They, too, are admitted.

The record in this case reflects Petitioner's unfamiliarity with the appeal process in general, and her very limited ability to frame her pleadings in a way that might make them clearer or more forceful. She has submitted no briefing in the usual sense, but has proffered a series of documents relevant to the events that led to her conviction and the events that followed. I have attempted to interpret and discuss her position based on all of her submissions, but in particular on her May 10, 2011 request for hearing. In doing so I have been guided by the notion that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991).

II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(2) of the Act; and

2. Whether the proposed five-year period of exclusion is unreasonable.

Both issues must be resolved in favor of the I.G.'s position. Section 1128(a)(2) of the Act mandates Petitioner's exclusion since her predicate conviction has been established. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), and is therefore reasonable as a matter of law.

III. Controlling Statutes and Regulations

Section 1128(a)(2) of the Act, 42 U.S.C. § 1320a-7(a)(2), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any "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." The terms of section 1128(a)(2) are restated in regulatory language at 42 C.F.R. § 1001.101(b). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a . . . State . . . court, regardless of whether . . . the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; or "when there has been a finding of guilt against the individual . . . by a . . . State . . . court," section 1128(i)(2) of the Act. 42 U.S.C. §§ 1320a-7(i)(1)-(2). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(2) is mandatory and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

In pertinent part, MASS. GEN. LAWS. ch. 265 § 13K(a1/2) provides:

> Whoever commits an assault and battery upon an elder or person with a disability shall be punished by imprisonment in the state prison for not more than 3 years or by imprisonment in a house of correction for not more than 2 1/2 years, or by a fine of not more than $1,000, or both such fine and imprisonment.

IV. Findings and Conclusions

I find and conclude as follows:

1. On December 14, 2010 in the Taunton District Court, Commonwealth of Massachusetts, Petitioner was found guilty by jury verdict of one count of the criminal offense of Assault and Battery on an Elderly or Disabled Person, in violation of MASS. GEN. LAWS. ch. 265 § 13K(a1/2). I.G. Exs. 4, 5.

2. The guilty verdict described above in Finding 1, and the disposition and sentence entered thereon, constitute a "conviction" within the meanings of sections 1128(a)(2) and 1128(i)(2) of the Act, and 42 C.F.R. § 1001.2.

3. There is a nexus and a common-sense relationship between the criminal offense of which Petitioner was convicted, as noted above in Finding 1, and the neglect or abuse of a patient in connection with the delivery of a health care item or service. I.G. Exs. 3, 4, 5; P. Ex. 6.

4. Petitioner's conviction of a criminal offense relating to neglect or abuse of a patient in connection with the delivery of a health care item or service constitutes a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Section 1128(a)(2) of the Act, 42 U.S.C. § 1320a-7(a)(2).

5. The five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, and is therefore not unreasonable. Section 1128(c)(3)(B) of the Act; 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

6. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The essential elements necessary to support an exclusion based on section 1128(a)(2) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the conviction must have been related to the neglect or abuse of patients; and, (3) the patient neglect or abuse to which an excluded individual's conviction related must

have occurred in connection with the delivery of a health care item or service. *Bruce Lindberg, D.C.*, DAB No. 1280 (1991); *Neitra Maddox*, DAB CR1218 (2004); *Maureen T. Kehoe*, DAB CR673 (2000); *Gabriel S. Orzame, M.D.*, DAB CR587 (1999); *Ann M. MacDonald*, DAB CR519 (1998); *Anthony A. Tommasiello*, DAB CR282 (1993).

Those three elements are demonstrated beyond dispute in this record. A recitation of the incident's details appears in I.G. Ex. 3, the Statement of Facts filed by the investigator, and it shows that Petitioner was employed as a CNA at SRSCC on March 15, 2010, and was directly engaged in providing patient care to a 92-year-old male resident when he began to struggle and she struck him with her fist. A similar recitation of the incident's details appears in P. Ex. 6. I.G. Exs. 3 and 4 confirm that the incident was the basis for the charge filed against Petitioner, and that the charge specifically relates to her abuse of the resident, in violation of MASS. GEN. LAWS. ch. 265 § 13K(a1/2), Assault and Battery on an Elderly or Disabled Person. The fact of her conviction on that charge is shown by I.G. Ex. 5. The I.G. has a basis for the proposed exclusion.

Because the I.G. has established a basis for Petitioner's exclusion pursuant to section 1128(a)(2), her exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act. 42 U.S.C. § 1320a-7(c)(3)(B). That period is reasonable as a matter of law.

As I have pointed out above, Petitioner has submitted only one document in which she states her position in narrative form. That document is her May 10, 2011 request for hearing, and it appears here *verbatim*:

> To Whom it may concern:
>
> I am writing this letter in response to the recent letter I received from the office of the OIG. I am requesting an appeal over the exclusion of my participation in the Medicare, Medicaid, and all federal health programs for five years. According to the findings in my judgment at Taunton court I am not to work on my certified nurses assistant license only for one year. Also according to the DPH findings, I was found not guilty. Attached to this letter are the findings of the DPH. Thank you for your time.
>
> Sincerely,
>
> Margally Samy.

The only attachments to this request for hearing were a copy of the Taunton District Court's disposition record (I.G. Ex. 5) and the I.G.'s April 29, 2010 notice-of-exclusion letter. The document Petitioner refers to as "DPH findings" appears to be her Settlement Agreement in complaint proceedings against her before the Massachusetts Department of Public Health (MDPH), and it is now part of this record as P. Ex. 6.

I interpret Petitioner's request for hearing as presenting two arguments: first, that the Taunton District Court's prohibition of her working with elderly or disabled persons during the one-year term of her probation is a bar to the I.G.'s proposed five-year exclusion from protected federal health programs; and second, that her settlement of the MDPH proceedings by agreeing to a 90-day suspension of her CNA certificate amounts to her exoneration of the state criminal charges. Neither of these arguments raises a valid defense to the exclusion.

Here, in the absence of an effort by the I.G. to enhance the period of exclusion by relying on certain aggravating factors, the terms of Petitioner's sentence are irrelevant. It is her conviction, not her sentence or the terms of her probation, that forms the predicate for the I.G.'s action. The I.G.'s action is mandatory, and the five-year exclusion is the mandatory minimum period that the I.G. must impose by the terms of section 1128(c)(3)(B) of the Act and 42 C.F.R. § 1001.102(a). No lesser period can be imposed by the I.G., by me, or by the Departmental Appeals Board (DAB). *Henry L. Gupton,* DAB No. 2058 (2007); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

Petitioner's reliance on her settlement of the MDPH proceedings seems misplaced: nothing in the Settlement Agreement can be construed as a finding of "not guilty." The Agreement does limit the possible sanctions to which Petitioner was exposed by imposing only the 90-day suspension of her certificate. It does resolve the MDPH complaint without further substantive proceedings. But the Agreement also acknowledges that the incident of March 15, 2010 at SRSCC happened and that Petitioner was culpable for her part in it. P. Ex. 6. And for the reasons set out in the paragraph immediately above, the fact that the MDPH proceedings resulted in a suspension of Petitioner's certification for only 90 days has no limiting effect on the I.G.'s mandatory imposition of the minimum period of exclusion.

I note once more that Petitioner appears here *pro se*, and that her skills in the English language are minimal. Because of those factors I have tried to be particularly mindful of the Board's reminders concerning *pro se* litigants. *Louis Mathews*, DAB No. 1574 ; *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264. I have searched the entire record before me, but have found no evidence or argument that might raise a valid, relevant defense to the I.G.'s Motion and the proposed exclusion.

Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). Resolution of a case by summary disposition is in order when settled law can be applied to undisputed material facts. *Marvin L. Gibbs, Jr., M.D.,* DAB No. 2279 (2009); *Michael J. Rosen, M.D.*, DAB No. 2096. The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law, and this Decision issues accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Margally Samy from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, pursuant to the terms of section 1128(a)(2) of the Act, 42 U.S.C. § 1320a-7(a)(2), is thereby sustained.

/s/
Richard J. Smith
Administrative Law Judge