Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Amanda Marie Brune,
(OI File No.: H-14-4-0513-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1335

Decision No. CR3447

Date: November 7, 2014

DECISION

Petitioner, Amanda Marie Brune, a.k.a. Amanda Marie Zwack, 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 June 19, 2014. There is a proper basis for Petitioner's exclusion based upon her conviction of a criminal offense related to the delivery of an item or service under a state health care program. Petitioner's exclusion for a minimum period of five years is required by 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, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

I. Background

The Inspector General (I.G.) of the U.S. Department of Health and Human Services notified Petitioner by letter dated May 30, 2014, that she was excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G. cited section 1128(a)(1) of the Act as the basis for Petitioner's exclusion based on her conviction in the District Court of Dubuque County, Iowa, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing on June 10, 2014 (RFH). On June 24, 2014, the case was assigned to me to hear and decide. On July 16, 2014, I convened a prehearing telephone conference, the substance of which is memorialized in my July 17, 2014 Order to Show Cause, Prehearing Conference Order, and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order). On September 2, 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 3. Petitioner filed a brief in opposition (P. Br.) on September 4, 2014, with no exhibits. The I.G. waived a reply on September 15, 2014. Petitioner did not object to my consideration of I.G. Exs. 1 through 3 and they are admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes 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 (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).[2]

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.

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

§ 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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> 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) of the Act, then there is no issue of whether the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2). Here, the I.G. has proposed to exclude Petitioner for the minimum authorized exclusion period, so the length of the proposed exclusion is not at issue.

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 timely filed her request for hearing and I have jurisdiction.

2. Summary judgment is appropriate.

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).

There are no genuine issues of material fact in dispute in this case. Petitioner does not deny that she entered a guilty plea to tampering with records in exchange for a deferred judgment. Petitioner does not deny that the records were related to the delivery of a health care item or service under a state health care program. Petitioner does not deny that the court entered an order of deferred judgment and sentenced her to pay restitution, a penalty, and expenses. RFH; P. Br. at 2-4. Petitioner argues that in January 2015 her record of this misdemeanor offense will be expunged. P. Br. at 3, 7. Petitioner also raises an issue as to whether she was "convicted" for purposes of section 1128(a) of the Act. All the issues raised by Petitioner must be resolved against her as a matter of law. Accordingly, summary judgment is appropriate.

3. Section 1128(a)(1) of the Act requires Petitioner's exclusion from participation in Medicare, Medicaid, and all other federal health care programs.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. 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). Thus, the plain language of 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 any state health care program. The definition of a "[s]tate health care program" includes state Medicaid plans. Act § 1128(h) (42 U.S.C. § 1320a-7(h)).

On August 27, 2013, an Assistant Iowa Attorney General filed an information charging Petitioner with one count of fraudulent practices in the second degree and one count of tampering with records. I.G. Ex. 2. The tampering with records count alleged violation of Iowa Code § 715A.5, in that Petitioner created at least 38 fraudulent records that purported to show Petitioner provided Medicaid services, an aggravated misdemeanor. I.G. Ex. 2 at 2. On November 19, 2013, Petitioner signed an agreement to plead guilty to the tampering with records charge. I.G. Ex. 3.

On January 10, 2014, the judge in the criminal case accepted Petitioner's guilty plea to the tampering with records charge. Consistent with Petitioner's plea agreement, the judge granted Petitioner a deferred judgment and probation. Petitioner was ordered to pay $3,000.20 restitution; $1,348.88 investigative expenses; a $625 civil penalty; $100 court costs; and other surcharges of $125. I.G. Ex. 1 at 1. The court also placed Petitioner on probation for 12 months. I.G. Ex. 1 at 2.

Petitioner disputes whether or not she was convicted within the meaning of section 1128(a) of the Act. The term "convicted" as used in section 1128(a) and (b) of the Act is defined at section 1128(i) of the Act. An individual or entity is convicted of a criminal offense when any of the following occur:

> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
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> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;

> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
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> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Act § 1128(i) (42 U.S.C. § 1320a-7(i)). In this case, Petitioner's guilty plea to the tampering with records charge was accepted by the trial judge and Petitioner was granted a deferred adjudication under Iowa law pursuant to the terms of her plea agreement. Accordingly, I conclude that Petitioner was convicted within the meaning of section 1128(a)(1) of the Act.

Petitioner does not dispute that the tampering with records charge to which she pled guilty related to the delivery of a health care item or service under the Medicare or Medicaid programs. The charge that she fraudulently created 38 records claiming that she provided services under Medicaid clearly shows a nexus between her conduct and the Iowa Medicaid program. I conclude that the criminal offense of which Petitioner was convicted was related to the delivery of an item or service under a state health care program, in this case the Iowa Medicaid program. Accordingly, I conclude that all three elements of section 1128(a)(1) of the Act have been met and there is a basis for Petitioner's exclusion.

Petitioner asserts in her request for hearing that she was charged with a misdemeanor not a felony offense. Although Petitioner is correct that the offense of which she was convicted was a misdemeanor, section 1128(a)(1) of the Act is triggered by any conviction of a program related crime whether a felony or a misdemeanor. Petitioner also argues that her misdemeanor conviction will ultimately be expunged. RFH; P. Br. at 3, 7. Whether or not her record of the misdemeanor conviction is ultimately expunged has no impact upon mandatory exclusion under section 1128(a)(1) of the Act. Act § 1128(i)(1).

Petitioner also argues that, although she pled guilty, she was innocent of the crime. P. Br. at 2, 4. Petitioner explains that she cared for her mother in her home. She was able to bill Medicaid for care and services she provided to her mother through a state program. During the period she cared for her mother, Petitioner also worked as a counselor at New Directions where she billed Medicaid for services. Petitioner asserts that it was her understanding that so long as she provided the care and services she claimed to her mother, it was not important to be accurate about the times she claimed that the care and services were provided. Petitioner states that she provided care to her mother but she did not keep records of the time when the care and services were provided, so she just guessed as to the times so she could file her claims with Medicaid. Unfortunately for

Petitioner, Medicaid discovered that time billed as services to Petitioner's mother was also time billed to Medicaid for services Petitioner claimed to be delivering to her clients at New Directions. Petitioner also alludes to allegations that she did not meet with a client at a time she claimed, and that she claimed to have met a client at a time she was known to have made purchases at Target. RFH; P. Br. at 2-6. Petitioner's exclusion is based on her conviction of a misdemeanor criminal offense to which she pled guilty. Petitioner's argument is a collateral attack on her conviction. The regulation is clear that Petitioner may not collaterally attack the conviction either on substantive or procedural grounds before me and I have no authority to review the conviction. 42 C.F.R. § 1001.2007(d).

Petitioner argues that it is unfair that she continues to be punished for a crime for which she was already punished. Petitioner argues that she has taken responsibility for her criminal actions, she pays restitution on time, yet, she continues to be punished. RFH; P. Br. at 3, 5-7. Petitioner's argument is not a basis for relief. 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.[3] Further, exclusions imposed by the I.G. are civil sanctions that have been found to be 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) *aff'd Harkonen v. Sebelius*, No. C13-0071 PJH, 2013 WL5734918 (N.D. cal. Oct. 22, 2013); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Janet Wallace, L.P.N.*, DAB No. 1126 (1992).[4]

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[3] 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).

[4] The exclusion remedy serves twin purposes of Congress: 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).

4. The minimum period of exclusion under section 1128(a) is five years.

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

I have concluded that there is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act. Therefore, Petitioner must be excluded 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.

III. Conclusion

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

/s/
Keith W. Sickendick
Administrative Law Judge