

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)
)
) Date: July 30, 2008
Elease R. Gaiter,)
)
)
) Petitioner,) Docket No. C-08-285
) Decision No. CR1823
)
) -v.-)
)
)
The Inspector General.)
)
)

DECISION

Petitioner, Elease R. Gaiter, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(1)), effective February 20, 2008, based upon her conviction of a criminal offense related to delivery of an item or service under Medicare or a state health care program. 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)).

I. Background

The Inspector General for the Department of Health and Human Services (the I.G.) notified Petitioner by letter dated January 31, 2008, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years, pursuant to section 1128(a)(1) of the Act. The

* 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.

basis cited for Petitioner's exclusion was her conviction in Gaston County, North Carolina, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. *See* Act § 1128(a)(1); 42 U.S.C. § 1320a-7(a)(1); and 42 C.F.R. § 1001.101(a).

Petitioner timely requested a hearing by letter dated February 2, 2008. The case was assigned to me for hearing and decision on February 22, 2008. On March 19, 2008, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated March 20, 2008. During the prehearing conference, Petitioner did not waive her right to an oral hearing, and the I.G. requested that a schedule be set for briefing its anticipated motion for summary judgment.

The I.G. filed a motion for summary judgment and supporting brief on May 2, 2008 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 through 4. Petitioner filed her opposition to the motion for summary judgment on June 13, 2008 with her personal statement, which I mark as Petitioner's exhibit (P. Ex. 1), and a certificate from the University of North Carolina School of Social Work, which I mark as P. Ex. 2. The I.G. filed a reply brief on June 27, 2008 (I.G. Reply) with I.G. Exs. 5 and 6. No objection has been made to the admissibility of any of the proposed exhibits and I.G. Exs. 1 through 6, and P. Exs. 1 and 2, are admitted. On June 30, 2008, Petitioner requested leave to file a sur-reply. Petitioner included her sur-reply with her request. The motion for leave is granted, and the sur-reply is accepted and considered.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings, and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. On October 6, 2005, Petitioner was convicted, pursuant to her plea of a misdemeanor offense of attempted medical assistance provider fraud, by The General Court of Justice, District Division, Gaston County, North Carolina. I.G. Ex. 3.
2. On October 6, 2005, Petitioner was sentenced to be confined for 45 days, but the sentence was suspended, and Petitioner was placed on 18 months of supervised probation and ordered to pay a fine of \$75 and restitution of \$1222.76. I.G. Ex. 3.

3. Petitioner does not dispute that the misdemeanor charge, to which she pled guilty, alleged that in January 2005, Petitioner attempted to make, and caused to be made, false statements and false representations of material fact for use in determining entitlement to payment from the North Carolina Medicaid program for medical assistance by providing therapy notes that indicated she provided counseling services that she did not provide. I.G. Exs. 2, 5.
4. The I.G. notified Petitioner by letter dated January 31, 2008, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(1) of the Act.
5. Petitioner timely requested a hearing by letter dated February 2, 2008.

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 of a criminal offense related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1) of the Act.
4. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.
5. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years, and that period is presumptively reasonable.
6. I have no authority to review or change the beginning date of the period of exclusion.

C. Issues

The Secretary of the Department of Health and Human Services (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).

In this case, there is no issue as to the reasonableness of the proposed period of exclusion as it is the minimum period of five years mandated by the Act. The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and 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) and (c).

D. Applicable Law

Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Pursuant to section 1128(i) of the Act, an individual is convicted of a criminal offense when: (1) a judgement of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) when there is a finding of guilt by a court; (3) when a plea of guilty or no contest is accepted by a court; or (4) when the individual has entered into any arrangement or program where judgment of conviction is withheld.

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. 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 may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). No aggravating factors are cited by the I.G. in this case, and the I.G. does not propose to exclude Petitioner for more than the minimum period of five years.

E. Analysis

1. Summary judgment is appropriate in this case.

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 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 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. *See, 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*, DAB CR672 (2000); *New Life Plus Center*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. Petitioner does not dispute that she was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program; that there is a basis for her exclusion; or that the minimum period of exclusion is five years. She requests only that I consider the hardship her exclusion will cause. The issue before me for resolution is an issue of law, no material facts are in dispute, and summary judgment is appropriate.

2. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

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.

The statute requires the Secretary to exclude from participation 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. Petitioner does not dispute that she was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Petitioner also does not dispute that the conviction was related to the delivery of an item or service under Medicare or a state health care program. Accordingly, I conclude that there is a basis for Petitioner's exclusion, and the exclusion is required by section 1128(a)(1).

In her sur-reply and in P. Ex. 1, Petitioner attempts to explain her conduct related to the charge to which she pled guilty. The regulation is clear that when the basis for exclusion is a conviction in a state or federal court, I may not review the facts that are the basis for the conviction, i.e., a Petitioner may not collaterally attack the conviction before me. 42 C.F.R. § 1001.2007(d)

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

Petitioner has not disputed that the minimum period of an exclusion pursuant to section 1128(a)(1) 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)(1), and the minimum period of exclusion is thus five years. The I.G. and I do not have authority under the Act to impose a period of less than five years. Thus, Petitioner's requests and arguments for a lesser period of exclusion cannot be considered to lessen the period of exclusion. Petitioner also requests imposition of community service for five years rather than exclusion for five years. P. Ex. 1; Sur-Reply. However, Congress has specified that exclusion is required for a minimum period of five years and no discretion is granted to the I.G. or me to impose an alternate sanction.

Petitioner also argues that her exclusion should run from the date of her conviction, October 6, 2005, rather than February 20, 2008. P. Ex. 1. However, pursuant to 42 C.F.R. § 1001.2007(a)(1) and (2), my jurisdiction is limited to the issues set forth above. I have no authority to review or remedy the I.G.'s delay in imposing the exclusion mandated by the Act under section 1128(a). *Randall Dean Hopp*, DAB No. 2166, at 2-4 (2008).

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, effective February 20, 2008, 20 days after the I.G.'s January 31, 2008 notice of exclusion.

_____/s/
Keith W. Sickendick
Administrative Law Judge