Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Blessing Okuji

Petitioner

v.

The Inspector General.

Docket No. C-11-21

Decision No. CR2343

Date: March 23, 2011

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 Blessing Okuji 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 to exclude Petitioner are based on section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The facts in this case mandate the imposition of a five-year exclusion. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Between June and October, 2005, Blessing Okuji was employed by a business called the Holistic Home Care Agency (Holistic). During that period, and acting as an employee of Holistic, she provided healthcare-related services to a Medicaid recipient named J. Lee in J. Lee's home in Kings County, New York. Holistic billed the New York Medical Assistance Program, that State's Medicaid program, for those services as if they had been provided by a nurse, although Petitioner was unlicensed to practice as a nurse in the State of New York.

On November 6, 2008 the Grand Jury sitting for the Supreme Court of the State of New York, County of Kings, handed up an Indictment charging Petitioner with two felonies, Grand Larceny in the Third Degree, in violation of N.Y. PENAL LAW § 155.35, and Unauthorized Practice of a Profession (Nursing), in violation of N.Y. EDUC. LAW § 6512(1). Petitioner reached a plea agreement with prosecutors, and on May 7, 2009, appeared with counsel in the Supreme Court of the State of New York, County of Kings, and pleaded guilty to one count of Criminal Trespass in the Second Degree, a misdemeanor, in violation of N.Y. PENAL LAW § 140.15. She was granted a conditional discharge and was ordered to pay restitution in the sum of $3000 to the New York State Medicaid Fraud Restitution Fund.

Section 1128(a)(1) of the Act mandates the exclusion of "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . any State health care program" for a period of not less than five years. On September 30, 2010 the I.G. notified Petitioner that she was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for a period of 5 years.

Acting through counsel, Petitioner timely sought review of the I.G.'s action by letter of October 8, 2010.

I convened a prehearing conference by telephone on October 22, 2010, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures best suited for addressing the issues presented by the case. By Order of October 26, 2010, as amended by my Orders of December 21, 2010 and January 31, 2011, I established a schedule for the submission of documents and briefs.

The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) with the proffer of Petitioner's Exhibit 1 on March 16, 2011.

The evidentiary record on which I decide the issues before me contains seven exhibits. The I.G. proffered seven exhibits marked I.G. Exhibits 1-7 (I.G. Exs. 1-7). Petitioner proffered one exhibit marked Petitioner's Exhibit 1 (P. Ex. 1). In the absence of objection, I have admitted all proffered exhibits.

II. Issues

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

a. 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)(1) of the Act; and

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

The controlling authorities require that these issues be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner's exclusion, for her predicate conviction and its nexus to the New York Medical Assistance Program 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 as a matter of law not unreasonable

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of a criminal offense related to the delivery of an item or service under title XVIII of the Act (the Medicare program) or any state health care program. The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.101(a). Neither the statute nor the regulation distinguishes between felony and misdemeanor convictions as predicates for 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; "when there has been a finding of guilt against the individual . . . by a . . . State . . . court," section 1128(i)(2) of the Act; "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a . . . State . . . court," section 1128(i)(3) of the Act; or "when the individual . . . has entered into participation in a . . . deferred adjudication . . . program where judgment of conviction has been withheld," section 1128(i)(4) of the Act, 42 U.S.C. §§ 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) 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.

IV. Findings and Conclusions

I find and conclude as follows:

1. On her accepted plea of guilty on May 7, 2009, in the Supreme Court of the State of New York, County of Kings, Petitioner Blessing Okuji was found guilty of one count of Criminal Trespass in the Second Degree, a misdemeanor, in violation of N.Y. PENAL LAW § 140.15. I.G. Exs. 3, 4, 6, 7.

2. Petitioner was sentenced on her guilty plea in the Supreme Court on December 14, 2009. As part of her sentence, Petitioner was ordered to pay restitution in the sum of $3000 to the New York State Medicaid Fraud Restitution Fund. I.G. Exs. 3, 4, 6, 7.

3. The accepted plea of guilty, finding of guilt, and judgment of conviction described above constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act, and 42 C.F.R. § 1001.2.

4. A nexus and a common-sense connection exist between the criminal offense to which Petitioner pleaded guilty and of which she was convicted, as noted above in Findings 1, 2, and 3, and the delivery of an item or service under the New York State Medical Assistance Program, a state health care program. I.G. Exs. 3, 4, 5; *Berton Siegel, D.O.*, DAB No. 1467 (1994); *Alexander Nepomuceno Jamias*, DAB CR1480 (2006).

5. By reason of Petitioner's conviction, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

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

7. 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)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (Medicare) or any state health care program.

Tamara Brown, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367 (1992); *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005), *aff'd sub nom. Kai v. Leavitt*, Civ. No. 05-00514 (D. Haw. July 17, 2006); s*ee also Russell Mark Posner*, DAB No. 2033, at 5-6 (2006). Petitioner has not seriously challenged the I.G.'s proof of the first element, but has vigorously argued that the second element is not present. Nevertheless, the record before me record demonstrates that there is objective proof of each, and that the I.G. has proven both elements essential to this exclusion.

Court records of Petitioner's conviction and its procedural history are before me as I.G. Exs. 3, 5, 6, and 7. She was originally charged with two felonies, the details of which are set out in an Indictment returned on or about November 6, 2008. I.G. Ex. 5. The first charge alleged that Petitioner caused false claims to be submitted to the New York Medical Assistance Program and paid to Holistic, and that the falsity of the claims lay in the fact that "claimed care and services were performed . . . by an unlicensed person practicing nursing." I.G. Ex. 5, at 2. The second charge alleged that Petitioner was the unlicensed provider of the care and services, and that she "held herself out as being able to practice the profession of nursing." I.G. Ex. 5, at 3. The two crimes were alleged to have been committed over a period between June 28 and October 1, 2005, and the false claims were alleged to have amounted to "over $3,000.00 to which neither the defendant nor the company were entitled." I.G. Ex. 5, at 2. The Indictment was sought and obtained by the Medicaid Fraud Control Unit (MFCU) of the New York State Attorney General's Office. I.G. Ex. 5.

Petitioner and her attorney negotiated a plea agreement with the MFCU. I.G. Ex. 3. By that agreement she pleaded guilty to one count of Criminal Trespass in the Second Degree, a misdemeanor, in violation of N.Y. PENAL LAW § 140.15, and agreed to pay restitution in the sum of $3000 to the New York State Medicaid Fraud Restitution Fund. In return, the MFCU agreed not to pursue further the charges set out in the Indictment. On May 7, 2009 — the same day the plea agreement was signed — Petitioner tendered her guilty plea, and the court accepted the plea, found her guilty, and entered judgment of conviction. I.G. Ex. 6. The court imposed a sentence of a one-year conditional discharge on December 14, 2009, and required Petitioner to pay the $3000 restitution as she had agreed in the plea agreement.

The facts recited in the two paragraphs immediately above establish the first essential element, Petitioner's conviction of a criminal offense. However, Petitioner has taken the position here that her conviction is not related to the delivery of an item or service under Medicare or any state health care program. She thus disputes the I.G.'s proof of the second essential element. But her position ignores the substance of her plea agreement and the objective links between that agreement, the charges she originally faced, and the specific allegations of the charge to which she pleaded guilty. I.G. Ex. 3, at 1-3; I.G. Ex. 5, at 2-3.

The plea agreement is clear in its recitation of the nexus between the charges in the Indictment that arose from false claims made to New York's Medicaid program for services not rendered as claimed, and the charge on which Petitioner was convicted. The plea agreement by its explicit language represented a reduction in the number and seriousness of the charges in return for a guilty plea. The times of the events, the total amount of the false claims, and the *locus* of the events charged all illustrate the relationship of the charges to one another. That the reduced charge makes no direct mention of Medicaid fraud is of no consequence here, for it is the relationship of the admitted charge to the Medicaid program, rather than the state's labeling of the admitted offense, that matters. *Michael S. Rudman, M.D.*, DAB No. 2171 (2008), *aff'd sub nom. Rudman v. Leavitt*, 578 F. Supp. 2d 812 (D. Md. 2008); *Lyle Kai, R.Ph.*, DAB No. 1979 (2005), *aff'd sub nom. Kai v. Leavitt*, Civ. No. 05-00514 (D. Haw. July 17, 2006). Were it necessary to rely on those recitations, I should have no difficulty in finding as a matter of fact that the crime of which Petitioner was convicted was related to the delivery of an item or service under the New York State Medicaid program. But I need not — and I explicitly do not — rely on them here. I rely instead on a much more direct line of proof.

I rely on that part of Petitioner's sentence that required her to pay "criminal restitution in the amount of $3000.00 to be paid to the 'New York State Medicaid Fraud Restitution Fund' over a two-year period." I.G. Ex. 3, at 3; *see also* I.G. Exs. 4, 6. As I have explained elsewhere, if an individual has been convicted of a criminal offense, then proof that any sentence based on that conviction included the payment of restitution to a protected program or the agency in charge of that program creates a rebuttable presumption of a nexus or common-sense connection between the conviction and the delivery of an item or service under the program. *Alexander Nepomuceno Jamias*, DAB CR1480 (2006). The I.G. has proven the second essential element.

Petitioner offers two additional arguments against the exclusion. She asserts, and for purposes of this Decision, I accept, that the State of New York's Office of Medicaid Inspector General has removed her from its list of disqualified providers, and has thus approved her to be employed in a facility enrolled in the Medicaid program. P. Ex. 1. That may very well be the case from the state's perspective, based on state standards, regulations, and proceedings. But the state's decision to end its own exclusion of Petitioner simply cannot limit or negate the application here of federal mandatory statutory provisions or the mandatory federal regulations implementing them. The I.G. has no discretion in the matter, and cannot be bound by the state's action. And Petitioner's second additional argument, in which she invokes "justice and equity" and "cries out for justice and to be allowed to work," fails for the same basic reason: appeals to what she sees as equity are not a defense to the mandatory imposition of this exclusion. *Henry L. Gupton*, DAB No. 2058 (2007); *Salvacion Lee, M.D.*, DAB No. 1850 (2002). As the Departmental Appeals Board observed in *Joann Fletcher Cash*, DAB No. 1725 (2000), the precise point of the exclusion mechanism is to prevent untrustworthy

individuals from being involved with protected health care programs. That this exclusion may have a dramatic impact on Petitioner's or any other excluded individuals' future employment opportunities is a logical consequence of any exclusion, including this one.

Because the I.G. has established a basis for Petitioner's exclusion pursuant to section 1128(a)(1), 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.

Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). Resolution of a case by summary disposition is particularly fitting 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 (2007). 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 forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Blessing Okuji 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)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is sustained.

/s/
Richard J. Smith
Administrative Law Judge