Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Debora Lynn Rivera,
(OI File No. H-13-40414-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-740

Decision No. CR3309

Date: July 23, 2014

DECISION

Petitioner, Debora Lynn Rivera, 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 January 20, 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 Medicare or a state health care program. 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)).[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 for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated December 31, 2013, that she was being excluded from participation in Medicare, Medicaid, and all 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, and stated that the exclusion was based upon her conviction in the Suffolk County Court of the State of New York, of a criminal offense related to the delivery of an item or service under the Medicare or a state health care program. I.G. Exhibit (Ex.) 1.

Petitioner timely requested a hearing by letter dated February 16, 2014. The case was assigned to me for hearing and decision on February 28, 2014. A telephone prehearing conference was convened on March 13, 2014, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued on that date.

The I.G. filed a motion to dismiss or, in the alternative, a motion for summary judgment and a brief in support of the motions (I.G. Br.) on April 11, 2014, with I.G. exhibits (I.G. Exs.) 1 through 5. Petitioner filed her opposition to the I.G.'s alternative motions on May 9, 2014 (P. Br.), with Petitioner's exhibits (P. Exs.) 1 through 3. The I.G. filed a reply brief on June 2, 2014 (I.G. Reply) and I.G. Ex. 6. No objections have been made to my consideration of I.G. Exs. 1 through 6 and P. 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 rights 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 this provision of the Act. 42 C.F.R. § 1001.101(a).[2]

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[2] References are to the revision of the Code of Federal Regulations (C.F.R.) in effect at the time of the I.G. action, unless otherwise indicated.

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. 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 is the basis for 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 Petitioner from participating in Medicare, Medicaid, and all other federal health care programs; and
>
> Whether the length of the proposed exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

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

2. **Summary judgment is appropriate in this case.**[3]

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[3] The I.G.'s motion to dismiss pursuant to 42 C.F.R. § 1005.2(e)(4) for failure to raise any issue that may be properly addressed in a hearing is not well-founded. Raising an issue that one must lose as a matter of law is not the same as failure to raise an issue that may be properly addressed by the tribunal, which appears to be the intent of the regulation. Further discussion is not required as the I.G. prevails on summary judgment.

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. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (holding 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 Ctr.*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. Petitioner does not contest the authority of the I.G. to exclude her for five years. She also does not deny that she was convicted as alleged by the I.G. or that her conviction is a proper basis for her exclusion. P. Br. at 1-2. [4] Petitioner does not dispute that her conviction subjects her to a minimum period of exclusion of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a). Petitioner challenges the effective date of her exclusion and argues that the I.G.'s delay in effectuating her exclusion effectively extended her period of exclusion beyond five years making the period of the exclusion unreasonable. P. Br. at 1-2. The issues raised by Petitioner must be resolved against her as a matter of law. Accordingly, summary judgment is appropriate.

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[4] Petitioner did not number the pages in her brief. However, Petitioner's brief consists of seven pages, and I will refer to those pages in order as if marked 1through 7.

3. Petitioner's exclusion is required by 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.

Act § 1128(a)(1). 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 a 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 March 18, 2011, Petitioner, a licensed practical nurse in the State of New York, was indicted by a grand jury in the County Court of the State of New York, Suffolk County, of one count of grand larceny in the third degree and ten counts of offering a false instrument for filing in the first degree. I.G. Ex. 2. The grand jury indictment alleged that between September 11, 2006, and February 11, 2009, Petitioner submitted multiple Medicaid claims to the State of New York that Petitioner knew contained false statements and false information charging for nursing services that were never provided to the Medicaid recipients. I.G. Ex. 2. On April 9, 2012, Petitioner was convicted by a jury of nine of the counts of offering a false instrument for filing in the first degree. I.G. Ex. 3; P. Br. at 2. On June 4, 2012, Petitioner was sentenced to five years of probation and ordered to pay restitution of $3,063. I.G. Exs. 3 and 5 at 10-11; P. Br. at 2. Petitioner does not dispute any of the foregoing facts. There is no dispute that she was convicted and that the conviction related to delivery of a health care item or service under the New York Medicaid program. Petitioner concedes that her conviction subjects her to exclusion pursuant to 1128(a)(1) of the Act. P. Br. at 1-2. Accordingly, I conclude that all three elements of section 1128(a)(1) of the Act are met and there is a basis for Petitioner's exclusion.

4. The minimum period of exclusion under section 1128(a) is five years. Act § 1128(c)(3)(B).

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

Petitioner does dispute that five years is the minimum period of exclusion authorized by Congress for exclusions pursuant to section 1128(a). Act § 1128(c)(3)(B). Pursuant to 42 C.F.R. § 1001.2007(a)(2), when the I.G imposes an exclusion pursuant to section 1128(a) of the Act for only five years, there is no issue of whether or not the period is unreasonable. Accordingly, I conclude that Petitioner's exclusion for a period of five years is not unreasonable as a matter of law.

However, Petitioner challenges the effective date of her exclusion arguing that the I.G.'s delay in effectuating her exclusion effectively extended her period of exclusion beyond five years making the period of the exclusion unreasonable. P. Br. at 1-2. Petitioner argues that the I.G. was aware of her conviction as early as February 2013. P. Ex. 3. But the I.G. waited 10 months, until December 31, 2013, before notifying her of the exclusion, thereby delaying the running of the period of exclusion. I.G. Ex. 1; P. Br. at 3. Petitioner claims that "there was no justification for [the] undue delay in imposing the exclusion." P. Br. at 3-4.

Petitioner acknowledges that the Departmental Appeals Board (Board) has consistently held that an ALJ and the Board do not have jurisdiction to alter the effective date of an exclusion. Petitioner requests that I reconsider the rationale underlying the prior decisions of the Board and impose a rule of reasonableness.
Petitioner advocates for an interpretation that a period of exclusion should run from the time of the criminal conviction or sentencing, or at latest, from the time the I.G. receives notice of the conviction. P. Br. at 4. Petitioner requests that in this case I rule that the five-year exclusion began on the June 4, 2012, the date of her sentencing, or February 25, 2013, the date Petitioner's counsel sent a letter to the I.G. regarding Petitioner's exclusion. P. Br. at 6-7; P. Ex. 3.

Petitioner's concern that the I.G. can effectively extend an exclusion by simply delaying notification of the exclusion is not without some merit. However, the Act and regulations are clear in this regard. The Act provides that an exclusion "shall be effective at such time and upon such reasonable notice to the public and to the individual . . . excluded as may be specified in regulations." Act § 1128(c). The Secretary has provided by regulation that exclusion is effective 20 days from the date of the I.G.'s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b). It is fundamental that I am bound to follow the Secretary's regulations. 42 C.F.R. § 1005.4(c)(1). Furthermore, the Board has consistently held that the applicable statute and regulations give an ALJ and the Board no authority to adjust the beginning date of an exclusion period by ruling that the effective date was some date prior to 20 days following the notice of exclusion. *Randall Dean Hopp*, DAB No. 2166, at 3 (2008); *Lisa Alice Gantt*, DAB No. 2065, at 2-3 (2007); *Thomas Edward Musial, R.Ph.*, DAB No.

1991 (2005), citing *Douglas Schram, R.Ph.*, DAB No. 1372, at 11(1992) ("Neither the ALJ nor this Board may change the beginning date of Petitioner's exclusion."); *David D. DeFries*, DAB No.1317 (1992) ("The ALJ cannot . . . decide when [the exclusion] is to begin."); *Richard D. Phillips*, DAB No. 1279 (1991) (An ALJ does not have "discretion . . . to adjust the effective date of an exclusion, which is set by regulation."). The Board's rationale in its prior decisions is sound and Petitioner offers me no justification for a departure. I conclude that I have no authority to change the effective date of Petitioner's exclusion as Petitioner requests. Accordingly, the effective date of Petitioner's mandatory exclusion is January 20, 2014, twenty days after the December 31, 2013, I.G. notice of exclusion. 42 C.F.R. § 1001.2002(b).

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 January 20, 2014.

/s/
Keith W. Sickendick
Administrative Law Judge