

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Joseph L. Barchue,
(OI File No. H-14-42212-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-884

Decision No. CR4066

Date: July 24, 2015

DECISION

Petitioner, Joseph L. Barchue, appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude him 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)) for five years. For the reasons discussed below, I find the I.G. was authorized to exclude Petitioner for the five-year minimum mandatory exclusionary period.

I. Background

In an October 31, 2014 letter, the I.G. notified Petitioner that he was excluding Petitioner from participating in Medicare, Medicaid, and all federal health care programs. The I.G. excluded Petitioner pursuant to section 1128(a)(1) of the Act for the minimum mandatory period of five years. The I.G. advised Petitioner that the exclusion was based on Petitioner's conviction in the District Court of Oklahoma County, State of Oklahoma, 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 before an administrative law judge, and the case was assigned to me. I convened a prehearing conference with the parties, which I summarized in my February 5, 2015 Order and Schedule for Filing Briefs and Documentary Evidence. Pursuant to that order, I asked the parties to answer the questions on short-form briefs I provided and to include any additional arguments and supporting documents they wished to present. The I.G. filed his short-form brief (I.G. Br.) together with three exhibits (I.G. Exs. 1-3). Petitioner filed a short-form brief (P. Br.) without exhibits. The I.G. filed a reply. Neither party requested an in-person hearing or objected to the opposing party's exhibits. P. Br. at 2; I.G. Br. at 5. I admit I.G. Exs. 1-3 into the record, and I decide the case based on the written record.

II. Discussion

A. Issue

The only issue before me is whether the I.G. had a legitimate basis to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act. If I find that the I.G. was authorized to exclude Petitioner, then I must uphold the I.G.'s exclusion because it is for the minimum mandatory period of five years. 42 C.F.R. § 1001.2007(a)(1)-(2).

B. Findings of Fact and Conclusions of Law

1. The I.G. had a legitimate basis to exclude Petitioner under section 1128(a)(1) of the Act.

The I.G. must exclude an individual when: 1) the individual has been convicted of a criminal offense, whether a felony or a misdemeanor; and 2) the criminal offense is related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1); *see also* 42 C.F.R. § 1001.101(a).

a. Petitioner was convicted of a criminal offense.

For purposes of exclusion, a conviction occurs when: 1) a judgment of conviction has been entered against an individual 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 the criminal conduct has been expunged; 2) there has been a finding of guilt against an individual by a federal, state or local court; 3) a plea of guilty or nolo contendere by an individual has been accepted by a federal, state, or local court; or 4) an individual 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).

Oklahoma's Attorney General filed a two-count criminal information against Petitioner on January 17, 2013, in the District Court of Oklahoma County. The Attorney General charged Petitioner with one count of felony Medicaid fraud and one count of misdemeanor Medicaid fraud under state law. The Attorney General alleged that Petitioner submitted claims to Oklahoma's Medicaid program for payment for counseling services that he did not provide to two individuals. The aggregate amount of the claims for one of the individuals exceeded \$2500, making it a felony under state law, while the aggregate amount of claims for the other individual did not exceed \$2500, making it a misdemeanor under state law. I.G. Ex. 3 at 1-2. The state subsequently amended the felony charge to a misdemeanor charge. I.G. Ex. 2 at 2, 4.

Petitioner entered a plea of guilty to two misdemeanor counts of Medicaid fraud under state law on November 25, 2013. I.G. Ex. 2 at 4. Under his plea agreement, Petitioner stated that he "submitted billing to [the] OK Health Care Authority that was not correct" and "submitted bills to OKHA for services not rendered." I.G. Ex. 2 at 6. The court accepted Petitioner's guilty plea, deferred his sentencing for one year, ordered him to submit to unsupervised probation, and ordered him to pay \$7,013.42 in restitution. I.G. Ex. 2 at 9, 11, 15, 16. Based on his guilty plea, Petitioner was convicted within the meaning of the Act. Act, § 1128(i)(3), (4).

Petitioner argues that he has not been convicted within the meaning of the Act. He asserts that "[m]isdemeanor [d]eferred [u]nsupervised [p]robation for one year is not a conviction" and that he "was not convicted of a crime." P. Br. at 2. Petitioner, however, is incorrect. Though Petitioner's sentencing appears to have been deferred, there is no evidence that Petitioner's guilty plea was withdrawn at the conclusion of the period of deferral, and Petitioner does not dispute that he pled guilty or that the court accepted his plea. Petitioner's guilty plea and the court's acceptance thereof are sufficient to render him convicted for purposes of exclusion.

b. Petitioner's conviction was related to the delivery of a service under a state health care program.

A conviction is related to the delivery of an item or service under a state health care program if there is a common sense connection or nexus between the offense and the delivery of the item or service. *Berton Siegel, D.O.*, DAB No. 1467 (1994). A state's Medicaid program is a "state healthcare program" under the Act. Act §§ 1128(h)(1); 1900(a). The Oklahoma Healthcare Authority is the state agency that administers the Medicaid program in Oklahoma. I.G. Br. at 3 n.1.

In this case, the connection or nexus is clear because Petitioner pled guilty to two counts of misdemeanor Medicaid fraud. Specifically, Petitioner admitted that he "submitted billing to [the] OK Health Care Authority that was not correct" and "submitted bills to OKHA for services not rendered." I.G. Ex. 2 at 6. It is well-established that an

individual who submits false bills for services to a state's Medicaid program has committed an offense related to the delivery of an item or service within the meaning of section 1128(a)(1) of the Act. *Joann Fletcher Cash*, DAB No. 1725, at 3 (2000) (citing supporting cases). Petitioner does not contest that the offenses to which he pled guilty relate to the delivery of an item or service under a state health care program. Based on the offenses to which Petitioner pled guilty and the underlying facts of those offenses, I find Petitioner's criminal offenses relate directly to his delivery of services under the Oklahoma Medicaid program.

c. I am unable to consider Petitioner's collateral attacks to his predicate conviction.

Petitioner also challenges the fairness of his predicate conviction. The bulk of Petitioner's argument relates to the unfairness he perceives in the criminal process that led to his conviction. For instance, he disputes that he committed the acts to which he pled guilty and insists that he pled guilty "because the judge was tired of the case not going anywhere." P. Br. at 4. He explains that he did provide the services the state alleged he did not provide, but he could not prove it because the agency for which he worked had moved offices, and he could not locate his "daily planner to validate the notes [he] submitted." P. Br. at 4. He describes a number of actors whom he believes instigated the charges against him due to a dispute with his wife and an investigation process that lacked clarity or fairness. Further, he believes that because an exclusion was not part of the disposition of his criminal case, it is unfair to impose one now, particularly because the Attorney General of Oklahoma has not allowed him to provide services since February 13, 2013. P. Br. at 2, 4. Finally, Petitioner states that he simply wants to help young people by making positive changes in their lives, and he has often done so on a volunteer basis in the past. P. Br. at 4.

While Petitioner's desire to help others may be laudable, I cannot review his predicate convictions. 42 C.F.R. § 1001.2007(d). This principle is firmly established. *See, e.g., Lyle Kai, R.Ph.*, DAB No. 1979, at 8 (2005) ("Excluding individuals based on criminal convictions provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes." (internal citations and quotations omitted)). Although Petitioner alleges he did not realize that accepting the plea would result in his exclusion, that is not a legal basis for me to reverse the exclusion. *See, e.g., Tamara Brown*, DAB No. 2195, at 10 (2008).

2. Petitioner's exclusion for five years is reasonable as a matter of law.

Petitioner claims the five-year exclusion is unreasonable under the circumstances and disproportionate to his offense. P. Br. at 4. When an individual is convicted of a Medicaid-related criminal offense, not only is the I.G. required to exclude that individual

pursuant to section 1128(a)(1) of the Act, but the period of exclusion must be at least five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a). I do not have the authority to consider any mitigating circumstances here. Therefore, Petitioner's exclusionary period of five years is reasonable as a matter of law.

III. Conclusion

I find the I.G. was authorized to exclude Petitioner under section 1128(a)(1) of the Act because Petitioner was convicted of two misdemeanor offenses related to the delivery of a health care service under the Oklahoma Medicaid program. The five-year exclusion that the I.G. imposed is mandatory as a matter of law and became effective 20 days from the date of the I.G.'s October 31, 2014 exclusion notice. *See* 42 U.S.C. § 1320a-7(a); 42 C.F.R. § 1001.2002(b).

/s/

Joseph Grow
Administrative Law Judge