Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Beverly Gentle a/k/a Beverley Gentle,

Petitioner,

v.

The Inspector General.

Docket No. C-11-60

Decision No. CR2354

Date: April 11, 2011

DECISION

Petitioner, Beverly Gentle, a/k/a Beverley Gentle, 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 September 20, 2010, 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. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

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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 August 31, 2010, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, the minimum statutory period. The I.G. advised Petitioner that she was being excluded pursuant to section 1128(a)(1) of the Act based on her conviction in the Kings County Supreme Court of the State of New York 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 by letter dated October 27, 2010. The case was assigned to me for hearing and decision on November 10, 2010. A prehearing telephone conference was convened on December 16, 2010, the substance of which is memorialized in my order dated December 17, 2010. During the prehearing conference, Petitioner declined to waive an oral hearing, and the I.G. requested to file a motion for summary judgment. Accordingly, I set a briefing schedule for the parties.

The I.G. filed a motion for summary judgment and a supporting brief (I.G. Brief) on January 14, 2011, with I.G. exhibits (I.G. Exs.) 1 through 7. Petitioner filed a brief in opposition to the I.G. motion on February 15, 2011 (P. Brief), with no exhibits. The I.G. filed a reply brief on March 3, 2011, with I.G. Exs. 8 and 9. Petitioner objects to my consideration of I.G. Exs. 2 and 3 on grounds that they are hearsay and do not "competently establish conduct which Petitioner did not plead guilty to having committed." P. Brief at 5 n.1. Petitioner's hearsay object is overruled.

Evidence that is relevant and authentic is generally admissible in administrative adjudications, whether or not hearsay, subject in this case to the provisions of 42 C.F.R. § 1005.17. 5 U.S.C. § 556(c)(3). Petitioner's objection that I.G. Ex. 2 and 3 do not "competently establish conduct" to which Petitioner did not plead guilty, I construe to be an objection that goes to the weight of the evidence and not its admissibility, and the objection is overruled. Petitioner may also be arguing that the exhibits are not sufficient to satisfy the I.G.'s burden of proof, *i.e.* to show by a preponderance of the evidence that there is a basis for exclusion. While I agree with Petitioner that I.G. Exs. 2 and 3, standing alone, are insufficient to meet the preponderance of the evidence test, that conclusion does not constitute grounds for exclusion of the evidence. Petitioner's evidentiary objections are overruled, and I.G. Exs. 1 through 9 are admitted.

On February 24, 2011, Petitioner requested that I stay her exclusion pending my decision in this case. On March 28, 2011, the I.G. requested leave to file a reply to the motion for stay with its reply attached. Petitioner's motion to stay her exclusion is rendered moot by this decision.

II. Discussion

A. Applicable Law

Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of the Department of Health and Human Services (the Secretary) are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)).

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 judgment 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 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). 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.

B. Issue

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
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> Whether the length of the 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.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction.

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 by 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 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 that, if true, would refute the facts that the moving party relied upon. *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) (finding 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 Life Plus Ctr.*, DAB CR700 (2000); *New Millennium CMHC*, DAB CR672 (2000).

There is no dispute that Petitioner was convicted of a criminal offense. The issue to be resolved, *i.e.*, whether Petitioner was convicted of an offense related to the delivery of an item or service under Medicare or Medicaid, is a mixed question of law and fact. However, there is no genuine dispute as to the facts that could result in a favorable decision for Petitioner, and the issue of law raised by Petitioner must be resolved against her as a matter of law. Accordingly, summary judgment is appropriate.

3. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

Petitioner states in her brief that, for a brief time, she was an hourly employee of "Holistic Home Care," a Brooklyn based home care agency. Petitioner states that she was paid $15 per hour for health care services provided to clients assigned to her. Petitioner admits that the New York Medicaid Fraud Control Unit, an Office of the Attorney General of the State of New York, initiated an investigation of Holistic Home Care and that she was charged with criminal offenses as a result of that investigation. P. Br. at 2.

On November 6, 2008, Petitioner was charged with grand larceny in the third degree and the unauthorized practice of nursing, both felonies. I.G. Ex. 4. On June 4, 2009, Petitioner signed a "Plea and Cooperation Agreement" (Plea Agreement) in which she agreed to plead guilty to the offense of criminal trespass in the second degree, a misdemeanor. In exchange for her plea, Petitioner received the agreement of the New York Medicaid Fraud Control Unit not to proceed on the greater charges. I.G. Ex. 2. In her Plea Agreement, Petitioner agreed that:

> [O]n or about November 12, 2005, to on or about August 2, 2006, in the County of Kings, State of New York, at the dwellings of Medicaid Recipients Frank Favale and Kylelars Wigfall, she entered and remained unlawfully causing damage totaling $5,000.

I.G. Ex. 2, at 2. On June 4, 2009, the Supreme Court of New York, Kings County, convicted Petitioner pursuant to her guilty plea of one count of criminal trespass in the second degree. On December 16, 2009, Petitioner was sentenced to conditional discharge and ordered to pay restitution of $5,000. I.G. Ex. 5.

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 that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a criminal offense, whether a felony or a misdemeanor; (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, within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), of a criminal offense. Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense: when a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is

pending or the record has been expunged; or when there has been a finding of guilt in a federal, state, or local court; or when a plea of guilty or no contest has been accepted in a federal, state, or local court; or when an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Petitioner was clearly convicted within the meaning of section 1128 of the Act, when her guilty plea was accepted and a judgment was entered finding her guilty of criminal trespass in the second degree. I.G. Exs. 5, 8. The offense of which Petitioner was convicted was a misdemeanor (I.G. Ex. 2, at 1), but that has no impact upon the application of section 1128(a)(1) of the Act.

Petitioner argues that criminal trespass under the New York penal code criminalizes knowingly entering or remaining unlawfully in a dwelling, and it contains no elements that relate to health care fraud. P. Br. at 2. Section 1128(a)(1) of the Act does not require that one be convicted of an offense related to health care fraud. Rather, section 1128(a)(1) only requires that the offense be related to the delivery of an item or service under Medicare or Medicaid. In this case, Petitioner admits that she worked for Holistic Home Care providing health care services to clients assigned to her. She admits that her criminal charges and the offense to which she pled guilty arose from her employment or association with Holistic Home Care. Furthermore, she pled guilty to entering and remaining unlawfully in the homes of two Medicaid recipients, Frank Favale and Kylelars Wigfall. I conclude, based upon the undisputed and admitted facts, that there is a nexus or common sense connection between the Petitioner's criminal offense and the delivery of an item or service under Medicare or Medicaid. *Timothy Wayne Hensley*, DAB No. 2044 (2006); *Neil Hirsch, M.D.*, DAB No. 1550 (1995); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993). Accordingly, the offense of which Petitioner was convicted was related to the delivery of an item or service under the New York Medicaid program, and the elements necessary for an exclusion pursuant to section 1128(a) of the Act are satisfied.

Petitioner cites the decision in *Stephen Klass, M.D.*, DAB CR 1986 (2009), arguing that the Petitioner in that case was not excluded though he should have been "more accountable." P. Br. at 4. However, as Petitioner recognizes, that case involved an exclusion under section 1128(b)(1) of the Act, which includes an element that the misdemeanor conviction that is the basis for exclusion be related to fraud, theft, embezzlement, breach of fiduciary duty, or some other financial misconduct. P. Br. at 4-5. Section 1128(a)(1) does not include an element that requires that the underlying conviction be related to fraud, theft, embezzlement, breach of fiduciary duty, or some financial misconduct. Petitioner questions why she should be excluded when Dr. Klass was not, even though his misconduct seemed more egregious. Congress did not give the I.G. or the ALJ the discretion to compare the relative seriousness of offenses. Exclusion pursuant to section 1128(a)(1) is mandatory when the elements are satisfied, and Congress established different elements for section 1128(a)(1) and 1128(b)(1). In short, it is the law, and the I.G. and the ALJ are required to comply.

Petitioner argues that she was suspended from participating in the New York State Medicaid program based upon her conviction, and that exclusion from Medicare for the same reason constitutes double punishment. P. Br. at 3. I.G. exclusions pursuant to section 1128 of the Act are civil sanctions designed to protect the beneficiaries of health care programs and are remedial in nature. Exclusions by the I.G. thus do not trigger the constitutional protections related to criminal sanctions, *e.g.* double jeopardy, since they are primarily remedial and not punitive.[2] *Manocchio v. Kusserow*, 961 F.2d 1539, 1542-43 (11th Cir. 1992), *cf. Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003), *cert. denied*, 539 U.S. 959 (2003) (finding no ex post facto problem because remedial not punitive). Even if considered two punishments, separate sovereigns imposed the exclusions, and the double jeopardy clause is not offended. *Abbate v. United States*, 359 U.S. 187 (1959).

Petitioner asserts that she was faced with a series of criminal charges and that she lacked the resources to effectively litigate the charges, so she pled guilty to the lesser offense. P. Br. at 2. Petitioner's argument may be construed to be an assertion that she was not really guilty, which could be construed to be an attack on her conviction. Under the regulations, Petitioner's underlying conviction is not reviewable or subject to collateral attack before me, whether on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d). Thus, I may not consider Petitioner's arguments attacking her conviction.

I conclude that there is a basis for Petitioner's exclusion, and her exclusion is mandated by section 1128(a)(1) of the Act.

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

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

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[2] The exclusion remedy serves twin congressional purposes: the protection of federal funds and program beneficiaries from untrustworthy individuals; and the deterrence of health care fraud. S. REP. NO. 109, 100th Cong., 1st Sess. 1-2 (1987), *reprinted in* 1987 U.S.C.C.A.N. 682, 686 (noting "clear and strong deterrent"); *Joann Fletcher Cash*, DAB No. 1725, at 18 (2000) (discussing trustworthiness and deterrence). When Congress added section 1128(a)(3) in 1996, it again focused upon the desired deterrent effect: "greater deterrence was needed to protect the Medicare program from providers who have been convicted of health care fraud felonies ...." H.R. REP. 496(1), 104th Cong., 2nd Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 1865, 1886.

Five years is the minimum authorized period for a mandatory exclusion pursuant to section 1128(a). Act § 1128(c)(3)(B). I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a) of the Act, and the minimum period of exclusion is five years and not unreasonable as a matter of law.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years effective September 20, 2010.

_____/s/_____
Keith W. Sickendick
Administrative Law Judge