Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ifiok Akpan
(O.I. No. 2-09-40563-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-241

Decision No. CR2392

Date: June 28, 2011

DECISION

Petitioner, Ifiok Akpan, asks review of the Inspector General's (I.G.'s) determination to exclude him for five years from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(1) of the Social Security Act (Act). For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner and that the statute mandates a minimum five-year exclusion.

Discussion

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from program participation. Because an exclusion under section 1128(a)(1) of the Act must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

The parties have submitted briefs (I.G. Br.; P. Br.), and the I.G. filed a reply. With his brief, the I.G. submitted six exhibits (I.G. Exs. 1-6). In the absence of any objections, I admit into evidence I.G. Exs. 1-6.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary and, if so, to "describe the testimony it wishes to present, the names of the witnesses it would call, and a summary of each witnesses' proposed testimony." I specifically directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs and Documentary Evidence, Attachment 1 (Informal Brief of Petitioner ¶ III) and Attachment 2 (Informal Brief of I.G. ¶ III) (February 11, 2011). The I.G. indicates that an in-person hearing is not necessary. Petitioner, on the other hand, contends that an in-person hearing is necessary and lists four witnesses that he intends to call. For two of the witnesses, himself and his wife, he explains that their testimony would show that his guilty plea to criminal charges was not voluntary. He does not explain why he wants to call the other two witnesses, saying "information not available at this time." P. Br. at 3.

Thus, Petitioner offers only one justification for an in-person hearing – to challenge his criminal conviction. As the following discussion explains, his criminal conviction may not be collaterally attacked in this forum. 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000). By regulation, I must exclude irrelevant or immaterial evidence. 42 C.F.R. § 1005.17(c). I am therefore obligated to exclude the testimony that Petitioner proposes, so an in-person hearing would serve no purpose.

> ***Petitioner must be excluded for five years because he was convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health program, within the meaning of section 1128(a)(1) of the Social Security Act.***[1]

From December 2004 until September 2006, Petitioner worked for a home health agency in New York State. Although he had no valid state nursing license, he worked as a licensed practical nurse, and the agency billed the Medicaid program for his "nursing services" as if they had been provided by a licensed nurse. The deception cost the State Medicaid program $4,000 in damages. I.G. Ex. 2 at 2; I.G. Ex. 4 at 6; I.G. Ex. 5. In November 2008, he was indicted on one felony count of grand larceny and one felony count of unauthorized practice of nursing. I.G. Ex. 6. Pursuant to a plea agreement, on May 7, 2009, he pled guilty in New York State Court to one misdemeanor count of attempted criminal trespass, and the court accepted the plea. I.G. Ex. 3; I.G. Ex. 4 at 5-7; I.G. Ex. 5.

In a letter dated December 30, 2010, the I.G. advised Petitioner that, because he had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health care program, the I.G. was excluding him from participation in

[1] I make this one finding of fact/conclusion of law.

Medicare, Medicaid, and all federal health care programs for a period of five years. The letter explained that section 1128(a)(1) of the Act authorizes such exclusion. I.G. Ex. 1.

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services exclude an individual who has been 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.[2] 42 C.F.R. § 1001.101.

Petitioner concedes that he was convicted of a criminal offense but argues that he was not convicted of an offense for which an exclusion is required. According to Petitioner, because he was convicted of attempted criminal trespass, his crime was not related to the delivery of an item or service under Medicare or a state health care program. P. Br. at 2.

In determining whether a conviction is program-related within the meaning of section 1128(a)(1), I may look beyond both the language of the statute under which he was convicted and the precise wording of his plea. An offense is related to the delivery of an item or service under Medicare or a state health care program, if there is "a nexus or common-sense connection" between the conduct giving rise to the offense and the delivery of the item or service. *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Berton Siegel, D.O.*, DAB No. 1467 (1994). It is well-settled that the I.G. may rely on extrinsic evidence to explain the circumstances underlying a conviction. The regulations specifically provide that evidence of "crimes, wrongs, or acts other than those at issue in the instant case is admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme." 42 C.F.R. §1005.17(g); *see Narendra M. Patel*, DAB No. 1736 (2000); *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Bruce Lindberg, D.C.*, DAB No. 1280 (1991).

Here, however, I need not even look at extrinsic evidence to find the necessary connection between Petitioner's crimes and the Medicaid program. In his plea agreement, Petitioner conceded that, "from on or about December 29, 2004 to on or about September 6, 2006," he entered the homes of Medicaid recipients and remained there unlawfully, causing $4,000 in damages to the New York State Medicaid program. I.G. Ex. 2 at 2. He agreed to make restitution in that amount. I.G. Ex. 4 at 5.

Petitioner was therefore convicted of a crime related to the delivery of an item under the Medicaid program, and is subject to a minimum five-year exclusion. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Petitioner also suggests that his plea was not voluntary and not adequately explained to him by his attorney. He says that he held a nursing license from Nigeria, which he

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[2] The term "state health care program" included a state's Medicaid program. Act § 1128(h)(1), 42 U.S.C. § 1320a-7(h)(1).

thought was valid "for this position." P. Br. at 3. According to the May 7, 2009 court transcript, however, the state court judge carefully explained the consequences of his guilty plea, and, under oath, Petitioner declared that his plea was voluntary and that he was adequately represented by counsel. I.G. Ex. 4.

In any event, federal regulations explicitly preclude any collateral attack on Petitioner's conviction.

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725; *Chander Kachoria, R.Ph.*, DAB No. 1380 at 8 (1993) ("There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions."); *Young Moon, M.D.*, DAB CR1572 (2007).

Conclusion

The I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs, and the statute mandates a five-year minimum period of exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge