

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Cynthia Beckhorn,
(OI File No. H-14-4-1281-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-2002

Decision No. CR3641

Date: February 11, 2015

DECISION

Petitioner, Cynthia Beckhorn, appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude her from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(1)) for a period of two years. I sustain the I.G.'s determination and find that there is a legal basis for the I.G. to exclude Petitioner and that an exclusion period of two years is reasonable based on the presence of one mitigating factor and no aggravating factors.

Background and Procedural History

On August 29, 2014, the I.G. notified Petitioner that she was being excluded, effective 20 days from the date of the I.G.'s letter, from participating in Medicare, Medicaid and all other federal health care programs pursuant to section 1128(b)(1) for a period of two years. As the basis for the exclusion, the I.G. cited Petitioner's conviction in the Rochester City Court of the State of New York, of a misdemeanor offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial

misconduct in connection with the delivery of a health care item or service. I.G. Ex. 1 at 1.

Petitioner filed a timely request for hearing, and the case was assigned to me for hearing and decision. I convened a prehearing conference by telephone on November 5, 2014, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence.

The I.G. filed a brief (I.G. Br.) together with seven exhibits identified as I.G. Ex. 1 – I.G. Ex. 7. Petitioner filed a brief (P. Br.) and three exhibits identified as P. Ex. 1 – P. Ex. 3. The I.G. thereafter filed a reply brief (I.G. Reply). Absent objections, I admit all of the exhibits into the record. Both parties proposed no witnesses and indicated that an in-person hearing was not necessary. P. Br. at 4; I.G. Br. at 11. I therefore decide this case based upon the written record.

Issues

1. Whether a legal basis exists for the I.G. to exclude Petitioner from participation in Medicare, Medicaid, and all other federally-funded health care programs pursuant to section 1128(b)(1) of the Social Security Act; and
2. Whether the length of the exclusion is unreasonable.

Findings of Fact and Conclusions of Law

1. A legal basis exists for the I.G. to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs because of her misdemeanor conviction for falsifying resident medical records with the intent to defraud state surveyors.

An exclusion under 1128(b)(1) of the Act depends upon proof of three essential elements: (1) the individual to be excluded must have been convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (2) the conviction must have been in connection with the delivery of a health care item or service; and (3) the criminal offense must have been committed after August 21, 1996. 42 U.S.C. § 1320a-7(b)(1)(A); 42 C.F.R. § 1001.201(a)(1).

A. Petitioner was convicted of a misdemeanor related to fraud in connection with a health care service after August 21, 1996.

An individual is “convicted” of a criminal offense when, among other actions, a plea of guilty or no contest has been accepted in a federal, state, or local court. Act § 1128(i) (42 U.S.C. § 1320a-7(i)); *see also* 42 C.F.R. § 1001.2.

The material facts of this case are not in dispute. On March 20, 2011, the New York State Department of Health was conducting a survey inspection of a nursing home where Petitioner was employed as a registered nurse and its Director of Nursing. I.G. Exs. 3 at 1-2; 4 at 6-7; 5 at 4. While the surveyors were at the facility, Petitioner held a meeting with department heads and nursing staff supervisors and expressed concerns about undocumented blanks in resident Medical Administration Records (MARs) and Treatment Administration Records (TARs). I.G. Exs. 3 at 2; 4 at 7. After this meeting Petitioner told the facility nursing staff to review resident records and fill-in any missing information. I.G. Ex. 3 at 2. Petitioner then proceeded to alter resident MARs and TARs by forging the initials of facility nurses without their consent. I.G. Ex. 5 at 2. Petitioner initiated these actions in order to deceive the state surveyors into thinking that the resident medical records were accurate and complete. I.G. Exs. 4 at 7-8; 5 at 4. Petitioner falsely represented that these nurses had provided services and administered medications to residents on dates in March 2011 when those nurses were not even on duty. I.G. Exs. 3 at 2-3; 4 at 7-8.

Petitioner was subsequently charged with one felony count of Falsifying Business Records in the First Degree, and two misdemeanor counts – Forgery in the Third Degree and Wilful Violation of the Health Laws. I.G. Ex. 3 at 1. Petitioner entered into a plea agreement with the New York State Office of the Attorney General. I.G. Ex. 5. Based on the agreement, Petitioner pled guilty on September 10, 2013, in the Rochester City Court to one count of Forgery in the Third Degree, a Class A misdemeanor in violation of N.Y. Penal Law § 170.05. I.G. Exs. 4 at 8; 5 at 2; 6. The court accepted Petitioner’s guilty plea. I.G. Exs. 4 at 8; 6. Therefore, when the court accepted her guilty plea relating to falsifying patients’ medication and treatment records, Petitioner was convicted for purposes of the Act. There is a direct nexus between Petitioner’s actions underlying that conviction and fraud in connection with the delivery of a health care service.

B. Petitioner may not now collaterally attack her underlying conviction in these proceedings.

Petitioner does not deny she was convicted of a criminal offense, but she collaterally attacks the underlying conviction. P. Br. at 1, 2. Petitioner admits that she signed her initials to resident treatment sheets that treating nurses left blank, but she argues that she knew that the nurses provided the treatment because she was on the skin care rounds on the days that she initialed the documents. Petitioner claims that she did not intend to commit fraud nor were the actions done with any intent for financial gain. P. Br. at 3; RFH at 1, 2. Petitioner also argues that although the initials on the treatment sheets resemble her writing, she infers that someone else could have easily duplicated her initials. P. Br. at 3.

Despite these contentions, 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). The Departmental Appeals Board has repeatedly affirmed this categorical preclusion. *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 cite omitted)). Thus, I may not consider Petitioner's arguments attacking her predicate conviction.

2. The exclusion of Petitioner for two years is within a reasonable range considering the presence of one mitigating factor.

To determine whether an exclusion period is within a reasonable range, an ALJ must weigh any aggravating and mitigating factors in the case and evaluate the quality of the circumstances surrounding the factors. *Vinod Chandrashekar Patwardhan, M.D.*, DAB No. 2454, at 6 (2012) (citing *Jeremy Robinson*, DAB No. 1905, at 11 (2004)). There is no “rigid formula” for the I.G. or an ALJ to determine an exact exclusion period when weighing and evaluating aggravating and mitigating factors. *Patwardhan*, DAB No. 2454, at 6. Rather, the ALJ must review the factors de novo to determine whether the exclusion imposed is within a “reasonable range” of exclusion periods. *Ruske*, DAB No. 1851, at 11, (citing *Gary Alan Katz, R.Ph.*, DAB No. 1842, at 8 n.4 (2002)). An exclusion becomes effective 20 days from the date of the I.G.'s notice letter. 42 C.F.R. § 1001.2002(b).

An exclusion imposed pursuant to section 1128(b)(1) of the Act is for a period of three years unless there is evidence relating to specific “aggravating” or “mitigating” factors. 42 U.S.C. § 1128(c)(3)(D); 42 C.F.R. § 1001.201(b)(1). Petitioner claims that the two-year period of exclusion is excessive and argues that this conviction was her first offense in more than 24 years as a nurse. P. Br. at 3. I find the I.G. already considered this argument and reasonably reduced Petitioner's period of exclusion to a two-year period because Petitioner was convicted of only one offense and no financial harm was attributed to her misconduct. *See* 42 C.F.R. § 1001.201(b)(3)(i); I.G. Br. at 10; I.G. Reply at 1; I.G. Ex. 1 at 2.

I have also carefully reviewed Petitioner's submissions, including the letters attesting to her character. P. Exs. 2, 3. However, only the specific mitigating factors outlined at 42 C.F.R. § 1001.201(b)(3) can be considered as a basis for reducing Petitioner's period of exclusion. I cannot reduce the I.G.'s period of exclusion based upon equitable considerations, such as for a person's good character. *See Donna Rogers*, DAB No. 2381, at 6 (2011).

Overall the I.G.'s exclusion determination is within a reasonable range, considering the presence of one mitigating factor, to provide protection to program beneficiaries and to

deter health care fraud. Petitioner falsely initialed resident medical records in order to defraud state surveyors. Petitioner's misconduct potentially endangered the nursing home residents because it concealed the fact that residents were deprived of necessary medicines and treatment and because the falsified medical records could have misled other health care providers into interacting with the residents based on inaccurate medical information.

Conclusion

A legal basis exists for the I.G. to exclude Petitioner from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(b)(1) of the Act. Petitioner was convicted of a misdemeanor relating to fraud in direct connection to the delivery of a health care service. I also find the two-year mitigated exclusion period that the I.G. imposed to be within a reasonable range. Therefore, I sustain the I.G.'s exclusion of Petitioner, effective September 18, 2014.

 /s/

Joseph Grow
Administrative Law Judge