

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jacqui L. Muez,
(OI File No. H-13-42755-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-313

Decision No. CR3761

Date: April 6, 2015

DECISION

Petitioner, Jacqui L. Muez, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(1)), effective September 18, 2014. There is a proper basis for Petitioner's exclusion based upon her conviction of a misdemeanor criminal offense of theft, committed after August 21, 1996, and in connection with the delivery of a health care item or service. Petitioner's two-year period of exclusion is not unreasonable. Act § 1128(c)(3)(D) (42 U.S.C. § 1320a-7(c)(3)(D)); 42 C.F.R. § 1001.201(b)(3)(i).¹

¹ Pursuant to 42 C.F.R. § 1001.3001(a), Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion. Citations are to the 2013 revision of the Code of Federal Regulations (C.F.R.), unless specifically stated.

I. Background

The Inspector General (I.G.) for the Department of Health and Human Services notified Petitioner by letter dated August 29, 2014, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of two years. The I.G. cited section 1128(b)(1) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based upon her misdemeanor conviction in Superior Court No. 2 of Tippecanoe County, State of Indiana. I.G. Exhibit (Ex.) 1.

Petitioner requested a hearing on November 2, 2014. On November 18, 2014, the case was assigned to me. I convened a telephone prehearing conference on December 1, 2014, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued on December 1, 2014. Petitioner waived an oral hearing and the parties agreed that this matter may be resolved based upon the parties' briefs and documentary evidence. Prehearing Order at 3. On January 14, 2015, the I.G. filed its brief and I.G. Exs. 1 through 8. Petitioner filed her brief together with four exhibits marked Petitioner's exhibits (P. Exs.) 1 through 4 on March 11, 2015. The I.G. filed a reply brief on March 16, 2015. Petitioner did not object to my consideration of I.G. Exs. 1 through 8 and they are admitted. The I.G. did not object to my consideration of P. Ex. 4 and that document is admitted as evidence.

The I.G. objected to P. Exs. 1 through 3 on grounds that they are not relevant to the issues before me. The Secretary of Health and Human Services (the Secretary) has limited my review to the issues of whether the I.G. has a basis for excluding Petitioner and whether the length of the exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(1). The I.G. has a basis for permissive exclusion under section 1128(b)(1) of the Act when there has been a conviction that meets the requirements of that section. The Secretary has also limited the I.G.'s and my authority with regard to the length of the period of exclusion. Section 1128(c) of the Act provides that for an exclusion under section 1128(b)(1) the period of exclusion is three years, unless a longer or shorter period is appropriate based on published aggravating or mitigating factors. 42 C.F.R. § 1001.201(b). The I.G. considered one mitigating factor established by 42 C.F.R. § 1001.201(b)(3)(i), when imposing a two-year exclusion against Petitioner. Evidence is relevant if it has any tendency to make a fact more or less probable and the fact is of consequence in deciding this case. Fed. R. Evid. 401. P. Ex. 1 is a letter from the Indiana State Nurse Assistance Program. P. Ex. 2 is a record of phone calls in February and March 2014 from Petitioner to the I.G. P. Ex. 3 is a letter of recommendation. P. Exs. 1, 2, and 3 do not have a tendency to make a fact of consequence to deciding whether Petitioner was convicted or whether her period of exclusion was unreasonable, more or less probable. Accordingly, P. Exs. 1, 2, and 3 are not relevant and may not be admitted as evidence. 42 C.F.R. § 1005.17(c).

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary.

Pursuant to section 1128(b)(1)(A) of the Act (42 U.S.C. § 1320a-7(b)(1)(A)), the Secretary may exclude from participation in any federal health care program an individual convicted under federal or state law of a misdemeanor criminal offense committed after August 21, 1996, related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of any health care item or service or with respect to any act or omission in a health care program not subject to section 1128(a)(1), operated by or financed in whole or part by any federal, state, or local government. Pursuant to section 1128(b)(1)(B), the Secretary may exclude from participation in any federal health care program an individual convicted under federal or state law of a misdemeanor criminal offense committed after August 21, 1996, related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program other than a health care program operated or financed by a federal, state or local government. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.201(a).

Section 1128(c)(3)(D) of the Act provides that an exclusion imposed under section 1128(b)(1) of the Act will be for a period of three years, unless the Secretary determines in accordance with published regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances. 42 C.F.R. § 1001.201(b). Recognized aggravating and mitigating factors are those listed in 42 C.F.R. § 1001.201(b)(2) and (3).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that provides the basis of 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 an individual or entity 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. The I.G. did not dispute that Petitioner timely filed her request for hearing and I have jurisdiction.

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 a 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). Petitioner waived an oral hearing and the parties agreed that this matter may be resolved based upon the parties' briefs and documentary evidence. Prehearing Order at 3.

2. Section 1128(b)(1)(A)(i) of the Act authorizes Petitioner's exclusion from Medicare, Medicaid and all other federal health care programs.

The I.G. notice of exclusion dated August 29, 2014, cited section 1128(b)(1) of the Act as the basis for Petitioner's exclusion. I.G. Ex. 1. The I.G. more precisely cites section 1128(b)(1)(A)(i) as the basis for exclusion in its brief. I.G. Br. at 1-2, 5.

Section 1128(b)(1)(A)(i) of the Act provides:

(b) PERMISSIVE EXCLUSION. – The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

(1) CONVICTION RELATING TO FRAUD. – Any individual or entity that has been convicted for an offense which occurred after [August 21, 1996] the date of the

enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law –

(A) of a criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct –

(i) in connection with the delivery of a health care item or service,

...

The elements for exclusion pursuant to section 1128(b)(1)(A)(i) are: (1) conviction in a state or federal court; (2) of a misdemeanor offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the offense occurred after August 21, 1996; and (4) the offense is in connection with the delivery of a health care item or service.

A seven-count information filed in the Superior Court of Tippecanoe County Indiana, charged Petitioner, a nurse, with three felony counts of possession of narcotic medications without a prescription; one felony count of theft of the prescription medication from St. Elizabeth Hospital, where she worked; and three felony counts of forgery of documents to obtain the prescription medications. I.G. Ex. 2. On May 10, 2012, Petitioner entered into a plea agreement pursuant to which she pled guilty to two counts charged in the information: Count IV, Possession of a Narcotic Drug; and Count VII, Theft, both Class D Felonies. IG Ex. 6. Count IV alleged that Petitioner knowingly or intentionally possessed a narcotic drug without a valid prescription or order of a practitioner. I.G. Ex. 2 at 4. Count VII charged Petitioner with the theft of prescription medications from St. Elizabeth Hospital. I.G. Ex. 2 at 7. On July 18, 2012, the Superior Court judge accepted Petitioner's plea agreement and her guilty pleas and found her guilty. The court sentenced Petitioner to two one-year terms of confinement to run concurrently; suspended the sentence to confinement for one year and placed Petitioner on probation; and the convictions were to be entered in the record as misdemeanors. The remaining charges were dismissed. I.G. Exs. 3-4, 7.

Petitioner does not deny that she was convicted or that the conviction satisfies the elements of section 1128(b)(1)(A)(i) of the Act. I conclude that the I.G. had a basis to exclude Petitioner pursuant to section 1128(b)(1)(A)(i) of the Act. All four elements required to exclude an individual under that section of the Act are present here. Petitioner was convicted within the meaning of 1128(i) of the Act when the state court accepted her guilty plea to the offense of theft. I.G. Exs. 2-4, 7. Petitioner was convicted of a misdemeanor offense. The offenses occurred in March and May of 2011, which is after August 21, 1996. I.G. Ex. 2 at 4, 7. Finally, Petitioner's offense of theft was in

connection with the delivery of a health care item or service as Petitioner was convicted of stealing prescription narcotic drugs, which were health care items, from St. Elizabeth Hospital where she worked. The required nexus between her crimes and the delivery of a health care item or service exists in this case.

3. Petitioner's exclusion for two years is not unreasonable.

The period of exclusion under section 1128(b)(1) is three years, unless aggravating or mitigating factors justify lengthening or shortening that period. Act § 1128(c)(3)(D); 42 C.F.R. § 1001.201(b)(1). Only the mitigating factors authorized by 42 C.F.R. § 1001.201(b)(3) may be considered to reduce the period of exclusion. The notice letter states that the I.G. considered one mitigating factor in deciding that the length of Petitioner's exclusion should be two years rather than three. The I.G. considered as a mitigating circumstance that Petitioner was convicted of three or fewer misdemeanor offenses and the entire amount of financial loss to a government program or to other individuals due to acts that resulted from the conviction was less than \$1,500. Petitioner does not identify any other mitigating factors authorized by the regulation that the I.G. failed to consider or that I should consider. I conclude therefore that the two-year exclusion is not unreasonable.

4. Petitioner's arguments are not a basis for granting any relief.

Petitioner argues that the I.G. is bound by the regulations in 42 C.F.R. § 1004.110(f), and that the I.G. should have finalized her exclusion within 120 days of sending an initial letter. Petitioner argues that the I.G. prematurely determined to exclude her without considering all the information she provided. Petitioner's argument is without merit for two reasons. The regulations at 42 C.F.R. pt. 1004 apply only to exclusions under section 1156 of the Act (42 U.S.C. § 1320c-5). Section 1156 governs sanctions, including exclusions, which are imposed by either a Quality Improvement Organization or the I.G. as a result of a referral from a Quality Improvement Organization. Petitioner's exclusion, however, was imposed pursuant to authority of section 1128(b)(1) of the Act and the applicable regulations governing exclusions pursuant to that statutory section are 42 C.F.R. pt. 1001. The regulations at 42 C.F.R. pt. 1001 have no time-limit similar to that in 42 C.F.R. pt. 1004. Also, in this case the I.G. had a basis for Petitioner's exclusion based on the undisputed fact that Petitioner was convicted of offenses that subjected her to exclusion under section 1128(b)(1) of the Act. Petitioner has offered no evidence that would tend to negate the existence of conviction that she might have submitted or that the I.G. could have considered. Collateral attack of her conviction on substantive or procedural grounds is not permitted. 42 C.F.R. § 1001.2007.

Petitioner also contends that the I.G. should have considered additional mitigating factors in this case based on the I.G.'s non-binding guidance regarding the criteria for implementing exclusions pursuant to section 1128(b)(7)² of the Act. 62 Fed Reg. 67,392, 67,393 (Dec. 24, 1997) (P. Ex. 4). However, that guidance specifically states that it applies only to exclusions under section 1128(b)(7) of the Act and Petitioner was excluded pursuant to section 1128(b)(1) of the Act. Therefore, the guidance related to section 1128(b)(7) is not applicable to Petitioner's exclusion. The I.G. found one mitigating factor under 42 C.F.R. § 1001.201(b)(3)(i) and reduced the length of Petitioner's exclusion from three to two years. Petitioner neither argued nor presented evidence to show that there are additional mitigating factors established by 42 C.F.R. § 1001.201(b)(3) that apply to her case that the I.G. failed to consider. Accordingly, I conclude that there is no basis for any further reduction in the length of the exclusion under the applicable regulations and the two-year exclusion is not unreasonable.

Petitioner argues in her request for hearing that that the two-year period for exclusion should have run from the date of her conviction. The Act and the regulations do not dictate when the I.G. must impose exclusion. *Kailash C. Singhvi, M.D.*, DAB No. 2138, at 4-5 (2007). The Board and I have no the authority to review the timing of the I.G.'s imposition of an exclusion or to change the effective date of the exclusion. *Randall Dean Hopp*, DAB No. 2166 (2008); *Singhvi*, DAB No. 2138; 42 C.F.R. § 1001.2007(a)(1).

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of two years, effective September 18, 2014.

/s/

Keith W. Sickendick
Administrative Law Judge

² Section 1128(b)(7) of the Act provides that the Secretary may exclude individuals and entities from participation in any federal health care program who the Secretary determines has committed an act which is described in section 1128A, 1128B, or 1129 of the Act.