Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kimbrell Colburn,
(O.I. File 1-11-40382-9),

Petitioner,

v.

Inspector General,
U.S. Department of Health & Human Services.

Docket No. C-15-2781

Decision No. CR4479

Date: December 3, 2015

DECISION

Petitioner, Kimbrell Colburn, 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 June 19, 2015. Petitioner's exclusion for the minimum period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B**)).**[1]

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated May 29, 2015, that she was being excluded from participation in Medicare, Medicaid, and all federal health care

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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.

programs for the minimum statutory period of five years. 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 United States District Court, Northern District of Alabama, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Exhibit (Ex.) 1.

Petitioner timely requested a hearing on June 4, 2015. The case was assigned to me on June 25, 2015, for hearing and decision. On July 23, 2015, I convened a prehearing telephone conference, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated July 23, 2015 (Prehearing Order).

On August 24, 2015, the I.G. filed a motion for summary judgment, a brief in support of summary judgment (I.G. Br.), and I.G. Exs. 1 through 4. On September 9, 2015, Petitioner filed a brief in opposition and a cross motion for summary judgment (P. Br.) and P. Exs. 1 through 3. The I.G. filed a reply brief (I.G. Reply) on October 5, 2015. On October 13, 2015, Petitioner filed a response (P. Sur-reply) to the I.G.'s reply brief. No objections have been filed to my consideration of I.G. Exs. 1 through 4 and P. Exs. 1 through 3. CMS Exs. 1 through 4 and P. Exs. 1 and 2 are admitted as evidence. P. Ex. 3 is a character reference which is not relevant to the issues I am permitted to decide and must, accordingly, be excluded as evidence. 42 C.F.R. §§ 1005.17(a), (c);[2] 5 U.S.C. §556(d).

II. Discussion

A. Applicable Law

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

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in any federal health care program any individual 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. The Secretary has promulgated regulations implementing this provision of the Act. 42 C.F.R. § 1001.101(a).

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[2] References are to the 2014 revision of the Code of Federal Regulations (C.F.R.), unless otherwise indicated.

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. 42 U.S.C. § 1320a-7(i)(1)-(4); 42 C.F.R. § 1001.2.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than 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).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis for 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 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).

If, as in this case, the I.G. imposes the minimum authorized five-year period for exclusion under section 1128(a) of the Act, there is no issue as to whether or not the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2).

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 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 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). 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 in an exclusion case when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *David A. Barrett*, DAB No. 1461 (1994); *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367 (1992); *Catherine L. Dodd, R.N.*, DAB No. 1345 (1992); *John W. Foderick, M.D.*, DAB No. 1125 (1990). When the undisputed material facts of a case support summary judgment, there is no need for a full evidentiary hearing, and neither party has the right to one. *Surabhan Ratanasen, M.D.*, DAB No. 1138 (1990); *John W. Foderick, M.D.*, DAB No. 1125. In opposing a properly-supported motion for summary judgment, the nonmoving party must show that there are material facts that remain in dispute, and that those facts either affect the proponent's prima facie case or might establish a defense. *Garden City Medical Clinic*, DAB No. 1763 (2001)*; Everett Rehab. and Med. Ctr.*, DAB No. 1628 (1997). It is insufficient for the nonmovant to rely upon mere allegations or denials to defeat the motion and proceed to hearing. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986).

There are no genuine issues of material fact in dispute in this case. The facts that trigger exclusion under section 1128(a)(1) of the Act are conceded, undisputed, or not subject to dispute. Petitioner argues that there are material facts in dispute as to the facts underlying her conviction and that her exclusion "is clearly based on the assumption of inaccurate facts." P. Br. at 1. However, as a matter of law Petitioner may not collaterally attack her conviction before me and is bound by the fact she was convicted and the facts she admitted as part of her plea agreement. 42 C.F.R. § 1001.2007(c), (d). Petitioner also contends that her exclusion should be pursuant to either sections 1128(b)(1), (7), or (9) of the Act rather than section 1128(a)(1). P. Br. at 3-4; P. Sur-reply at 2. Petitioner's argument that a different section of the Act applies is a legal issue and not a disputed material fact that prevents summary judgment. Petitioner also ignores the fact that Congress has granted the I.G. no discretion to select to impose a permissive exclusion under section 1128(b) of the Act, when the elements for mandatory exclusion under section 1128(a) of the Act a met. A discussed in more detail in my "Analysis," I conclude that there is no genuine dispute as to the facts that support the legal conclusion

that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Furthermore, the period of exclusion imposed is the minimum permitted by Congress for a mandatory exclusion and whether or not the five-year minimum period is unreasonable is not an issue before me. 42 C.F.R. § 1001.2007(a)(2). Petitioner's challenge to her exclusion must be resolved against her as a matter of law. Accordingly, summary judgment is appropriate.

3. Petitioner's exclusion is required by section 1128(a)(1) of the Act.

a. Facts

The material facts are undisputed. On September 14, 2014, a one-count Information was filed in the U.S. District Court, Northern District of Alabama, Southern Division, charging Petitioner with making or causing to be made false statements or representations involving a federal health care program from on or about October 2006 through on or about October 2011, in violation of 42 U.S.C. § 1320a-7b(a)(3)(B). I.G. Ex. 3.

Petitioner signed a plea agreement on September 16, 2014. Petitioner agreed to plead guilty to the charge set forth in the information in exchange for a limitation on her sentence. I.G. Ex. 2; P. Ex. 1. As part of the plea agreement, Petitioner stipulated that she was a physician's assistant to Dr. A, a surgeon.[3] Dr. A prescribed bone growth stimulators for patients, including Medicare beneficiaries, to wear after spinal fusion surgery. Petitioner stipulated as part of her plea agreement that from October 2006 through October 2011, she

> was in a position to recommend and assure that Company A's bone growth stimulator would be used by Dr. A for patients, including Medicare beneficiaries, to wear after spinal fusion surgery . . . . [Petitioner] assisted in filling out the Certificate of Medical Necessity and submitting the Certificate of Medical Necessity and other records to Company A for submission to CMS . . . . [Petitioner] was paid, directly, and indirectly, by Company A for each bone growth stimulator used by Dr. A for patients, including Medicare beneficiaries. The total amount of these remunerations, associated with federal health care programs, including Medicare, was at least approximately $17,863.42.

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[3] The Plea Agreement uses "Dr. A" and "Company A." I.G. Ex. 2; P. Ex. 1.

I.G. Ex. 2 at 3-4; P. Ex. 1 at 3-4. The conduct Petitioner admits in her affidavit is consistent with the facts she admitted as part of her plea agreement. P. Ex. 2.

On December 17, 2014, Petitioner was adjudged guilty pursuant to her guilty plea to one count of false statements related to Medicare claims, in violation of 42 U.S.C. § 1320a-7b(a)(3)(B). I.G. Ex. 3. Petitioner was sentenced to three years on probation and a $10,000 fine. I.G. Ex. 4.

b. Analysis

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)):
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> (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.

Act § 1128(a)(1) (emphasis added).[4] The statute requires that the Secretary exclude from participation any individual or entity: (1) convicted of a criminal offense (whether felony or 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 deny that she was convicted of a criminal offense within the meaning of section 1128(i) of the Act. RFH; P. Br. at 3. Petitioner's guilty plea was accepted and she was found guilty pursuant to her plea. The district court issued a judgment of conviction and sentenced Petitioner for the offense of which she was convicted. I conclude that Petitioner was convicted of a criminal offense within the meaning of the section 1128(i) of the Act.

Petitioner argues that the facts urged by the I.G. in support of his motion for summary judgment are inaccurate, clearly erroneous, totally false, and untrue. P. Br. at 1-2;

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[4] Title XVIII of the Act established the federal Medicare program which provides health insurance for the aged and disabled.

P. Sur-reply at 1. My findings of fact set forth above are based on Petitioner's plea agreement, her affidavit, and the other documents admitted as evidence. I do not rely upon counsels' characterization of the facts. Petitioner pleaded guilty stipulating to the factual basis for her plea. Petitioner is bound in this forum by the facts to which she stipulated in pleading guilty and the resulting conviction. Petitioner may not collaterally attack her conviction before me and I have no jurisdiction to review the basis for her conviction. 42 C.F.R. § 1001.2007(d).

The facts that I have found based on the evidence satisfy the remaining two elements of section 1128(a)(1) of the Act, *i.e.*, that Petitioner's offense was related to the delivery of a health care item or service, and that the delivery was under Medicare or a state health care program. I consider whether there is a common sense connection or nexus between the conduct that was the offense and the delivery of an item or service under Medicare or a state health care program. *Berton Siegel, D.O.*, DAB No. 1467 (1994). To determine whether there is a nexus or common-sense connection between the offense and the delivery of an item or service under Medicare or Medicaid, "evidence as to the nature of an offense may be considered," including "facts upon which the conviction was predicated." *Siegel*, DAB No. 1467 at 6-7. Therefore it is necessary for me to examine the circumstances surrounding Petitioner's conviction to determine whether it was program-related. *Siegel*, DAB No. 1467 at 6-7; *Dewayne Franzen*, DAB No. 1165, at 6 (1990) (finding that an ALJ's "task is to examine all relevant conduct to determine if there is a relationship between the judgment of conviction and the Medicaid program."). In this case, the charge to which Petitioner pleaded guilty and of which she was convicted specifically alleges a relationship or nexus with Medicare. I.G. Ex. 3. Furthermore Petitioner admitted as part of her plea agreement that she received payment from Company A in exchange for using her "position to recommend and assure that Company A's bone growth stimulator would be used by Dr. A for patients, including Medicare beneficiaries, to wear after spinal fusion surgery" and that she "assisted in filling out the Certificate of Medical Necessity and submitting the Certificate of Medical Necessity and other records to Company A for submission to CMS." I.G. Ex. 2 at 3-4. Petitioner's confession in her plea agreement clearly shows a nexus between Petitioner's offense and the Medicare program. Petitioner cannot now disavow the admissions she made as part of her plea agreement in her criminal case.

I conclude that Petitioner was convicted of an offense that was program-related and involved the delivery of a health care item or service. Accordingly, all three elements of section 1128(a)(1) of the Act are met and Petitioner's exclusion is required.

Petitioner admits in her affidavit that she received payments from Company A. She states however that she was never educated regarding any kickback statute and was not aware that she was doing anything improper. P. Ex. 2. Petitioner's purported lack of knowledge has no impact upon her exclusion as it is her conviction not her knowledge or intent for which Congress has directed that she be excluded. Act § 1128(a)(1).

Petitioner argues that the offense to which she pled guilty is a misdemeanor and meets the requirements for a permissive exclusion under either sections 1128(b)(1), (7), or (9) of the Act. I accept for purposes of summary judgment Petitioner's assertion that she was convicted of a misdemeanor rather than a felony. Petitioner further argues that the I.G. erred in excluding her pursuant to the mandatory exclusion authority contained in section 1128(a)(1) of the Act because Petitioner is not an incompetent practitioner, did not provide inappropriate or inadequate care, did not act to intentionally obtain kickbacks, did not use her position inappropriately, that bone growth stimulators are medically necessary, and only pleaded to a single misdemeanor count. P. Br. at 3-4. Petitioner's arguments that the I.G. should have exercised discretion to impose a permissive exclusion rather than mandatory exclusion is without merit because the I.G. does not have the discretion to make that choice. Congress did not distinguish in section 1128(a) of the Act between misdemeanors and felonies – either level of offense may trigger mandatory exclusion. Appellate panels of the Departmental Appeals Board (the Board) have stated "the Act expressly provides for mandatory five-year minimum periods of exclusion *whenever* an individual has been convicted 'of a criminal offense related to the delivery of an item or service' under specific programs . . . without any requirement that the offense be a felony." *Craig Richard Wilder*, DAB No. 2416, at 7 (2011) (quoting *Tanya A. Chuoke, R.N.*, DAB No. 1721, at 14 (2000) (italics in original)). Board decisions have also consistently held that if a conviction is shown to be within the reach of section 1128(a)(1), the Act requires the I.G. to impose a mandatory exclusion. *Wilder*, DAB No. 2416, at 7; *Lorna Fay Gardner*, DAB No. 1733, at 6 (2000) (rejecting petitioner's argument that her misdemeanor conviction should be considered under the permissive exclusion rather than the mandatory exclusion provisions of section 1128 of the Act). The I.G. has no discretion to impose a permissive exclusion where an individual's conviction satisfies the elements of section 1128(a)(1) of the Act. *Tarvinder Singh, D.D.S.*, DAB No. 1752 (2000) (rejecting petitioner's claim that his misdemeanor conviction was more properly subject to a three-year permissive exclusion when the threshold provisions of the mandatory provisions of section 1128(a)(1) have been met). The Board's analysis in its cases is persuasive in this case. Petitioner was convicted of an offense within the ambit of section 1128(a)(1) of the Act and the I.G. had no discretion to impose a permissive exclusion.

Petitioner cites in her briefs *Travers v. Sullivan*, 791 F. Supp. 1471 (E.D. Wash. 1992), but Petitioner's reliance on this case is misplaced. The court in *Travers* upheld a Board decision affirming an ALJ decision on summary judgment to exclude an individual. The court in *Travers* recognized that under section 1128(i) of the Act, a conviction includes entry into a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld and, even if, acceptance of a guilty plea has been deferred. The court in *Travers* also recognized that when the facts trigger a mandatory exclusion under section 1128(a) of the Act, the I.G. has no discretion to impose a permissive exclusion under section 1128(b). Petitioner argues, citing *Travers*,

that since 1987, "mere 'participation'" in the delivery of an item or service does not require mandatory exclusion. P. Sur-reply at 3. Petitioner's reading of the *Travers* decision is faulty. The court in *Travers* pointed out that after 1987 there was no longer a requirement that the offense involve participation in the delivery of an item or service under Medicare or a state health care program. Rather, after 1987, it was sufficient for the offense to be simply related to the delivery of an item or service. *Travers* at 1481.

4. The minimum period of exclusion under section 1128(a) is five years.

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

I have concluded that there is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act. Therefore, Petitioner must be excluded for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period, and I may not reduce the period of exclusion below five years. The character reference from her current employer that Petitioner submitted as P. Ex. 3 may not be considered as I have no authority to review the reasonableness of the period of exclusion.

Exclusion is effective 20 days from the date of the I.G.'s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b).

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for the minimum statutory period of five years, effective June 19, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge