Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Cedonne Ngwilefem Alemnji
(O.I File No. 3-10-40264-9),

Petitioner,

v.

The Inspector General,
Department of Health & Human Services.

Docket No. C-15-2878

Decision No. CR4484

Date: December 7, 2015

DECISION

Petitioner, Cedonne Ngwilefem Alemnji, is excluded from participation 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 April 20, 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 March 31, 2015, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(1) of the Act. The basis cited for Petitioner's exclusion was her conviction in the Superior Court of the District of Columbia, of a criminal offense related to the delivery of an item

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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.

or service under Medicare or a state health care program. I.G. Exhibit (I.G. Ex.) 1. Petitioner timely requested a hearing by letter dated May 5, 2015. The case was assigned to me on June 18, 2015, for hearing and decision.

On July 20, 2015, I convened a prehearing conference by telephone, the substance of which is memorialized in my Order to Show Cause, Prehearing Conference Order, and Schedule for Filing Briefs and Documentary Evidence dated July 23, 2015 (Prehearing Order). Petitioner failed to appear for the prehearing conference but subsequently established good cause for why this case should not be dismissed for abandonment or as a sanction.

The I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) on September 2, 2015, with I.G. Exs. 1 through 3. Petitioner filed a brief in opposition to the I.G. motion (P. Response) on September 16, 2015. Petitioner also filed two sets of documents as exhibits on September 16, 2015. Petitioner's exhibits were filed in the Departmental Appeals Board Electronic Filing System (DAB E-File) as documents #10 and #11a. Petitioner's exhibits were not properly marked and paginated as required by the Prehearing Order and the Civil Remedies Division Procedures (CRDP). However, the exhibits were not rejected because there was little potential for confusion due to the absence of proper marking. DAB E-File document #10 is treated as marked as Petitioner's Exhibit (P. Ex.) 1, pages 1 through 19 and document #11 is treated as marked as P. Ex. 2, pages 1 through 7. The I.G. filed a reply brief (I.G. Reply) on November 2, 2015. No objections have been made to my consideration of the offered exhibits and I.G. Exs. 1 through 3 and P. Exs. 1 and 2 are admitted.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner with rights to an Administrative Law Judge (ALJ) hearing and judicial review of the final action of the Secretary of Health and Human Services (Secretary). The right to hearing before an ALJ is set forth in 42 C.F.R. §§ 1001.2007(a) and 1005.2,[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).

The Secretary must exclude from participation in federal health care programs any individual convicted of a criminal offense under federal or state law that is related to the

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

delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1). The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a).

Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), 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) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld. The statute does not distinguish between misdemeanor and felony convictions.

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. The exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b). 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 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 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. Issue

The Secretary has by regulation limited my scope of review to two issues:

> Whether the I.G. has a basis for excluding Petitioner from participation in Medicare, Medicaid, and all federal health care programs; and
>
> Whether the length of the proposed period of exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). If the I.G. imposes the minimum period of exclusion authorized for a mandatory exclusion under section 1128(a)(1) of the Act, then there is no issue of whether the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(1). The I.G. proposes to exclude Petitioner for five years, the minimum authorized period. Therefore, whether the length of the proposed exclusion is unreasonable is not an issue.

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 I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

Petitioner has not waived an oral hearing and the I.G. has moved for summary judgment. An ALJ may 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); *Foderick*, 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 Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & 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. Petitioner does not dispute that she was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Petitioner does not dispute that her criminal offense was related to the delivery of a health care item or service under Medicare or a state health care program. Her sole arguments are that she was unaware of the consequences of pleading guilty to the criminal offense and that there are factors that support her request for "some modicum of leniency" and a reduction in the five-year exclusion period to one year. P. Br. at 4-6. Petitioner's arguments require application of law to the undisputed facts and, as discussed hereafter, are resolved against her. I conclude that summary judgment is appropriate as there are no genuine disputes as to any material facts and the I.G.

prevails as a matter of law on the issue of whether there is a basis for exclusion based on the undisputed facts. Accordingly, summary judgment is appropriate.

3. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

Exclusion from participation in Medicare, Medicaid, and all federal health care programs is required by section 1128(a)(1) of the Act when: (1) the individual has been convicted of a criminal offense; and 2) the criminal offense is related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1); 42 C.F.R. § 1001.101(a).

a. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act.

It is undisputed that on October 29, 2014, Petitioner was convicted pursuant to her guilty plea in the Superior Court of the District of Columbia of one felony count of second degree fraud. I.G. Ex. 2; P. Ex. 1 at 1; P. Response at 1-4. Petitioner pleaded guilty pursuant to the terms of a plea agreement she signed on June 6, 2014. I.G. Ex. 3. Petitioner's sentence included probation and restitution. I.G. Ex. 2 at 2 . The acceptance of Petitioner's guilty plea and the entry of the judgment of conviction by the Superior Court of the District of Columbia amount to a "conviction" within the meaning of section 1128(i)(1) and (3) of the Act.

b. Petitioner's criminal offense is related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1) of the Act.

The statute requires that Petitioner be excluded if she was convicted of an offense relating to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1). Petitioner does not deny that her criminal offense was related to the delivery of a health care item or service under a state health care program, specifically the District of Columbia (D.C.) Medicaid program. On February 19, 2014, Petitioner was charged as follows:

> Commencing on or about January of 2013, and continuing thereafter to on or about December of 2013, within the District of Columbia, Cedonne Ngwilefem Alemnji [Petitioner] engaged in a scheme and systematic course of conduct, with intent to defraud and to obtain property of the D.C. Medicaid Program by means of false or fraudulent pretense, representation, and promise and thereby obtained property of a value of $1000 or more or caused the loss of

> property of a value of $1000 or more belonging to the D.C. Medicaid Program, consisting of money.

P. Ex. 1 at 14; P. Ex. 2 at 2.

In her plea agreement, which she signed on June 6, 2014, Petitioner agreed the government could prove beyond a reasonable doubt that Petitioner, a licensed practical nurse, paid cash kickbacks to a D.C. Medicaid beneficiary and also to another individual who was posing as a D.C. Medicaid beneficiary in exchange for each of the individuals signing timesheets falsely indicating that Petitioner had provided them with personal care services when, in fact, the services had not been provided. Petitioner agreed that she provided the timesheets to two of her home health aide providers, who then submitted the false timesheets to the D.C. Medicaid program for payment. She agreed that D.C. Medicaid paid $26,740.80 for services that were not provided by Petitioner. Petitioner agreed that the loss to the D.C. Medicaid program was $26,740.80, and that she would pay the full amount of restitution jointly and severely with her two co-defendants. I.G. Ex. 3 at 1-5; P. Ex. 1 at 16-19. The D.C. Medicaid program meets the definition of a state health care program. 42 C.F.R. § 1001.2. Therefore, there is no genuine dispute that Petitioner's conviction related to the delivery of a health care item or service under a state health care program.

The two elements that trigger mandatory exclusion under section 1128(a)(1) of the Act are satisfied. Accordingly, 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. Five years is the minimum authorized period of exclusion pursuant to section 1128(a) of the Act.

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

Petitioner requests a reduction in the length of her exclusion. P. Response at 2, 5-6. However, the I.G. has imposed the minimum five-year period of exclusion authorized under the Act. Act § 1128(c)(3)(B). When the I.G. imposes the minimum period of exclusion authorized for a mandatory exclusion under section 1128(a)(1) of the Act, then there is no issue of whether the period of exclusion is unreasonable for me to decide. 42 C.F.R. § 1001.2007(a)(2).

Petitioner advises me that she filed a motion with the Superior Court for the District of Columbia on July 29, 2014, seeking to vacate her judgment of conviction and permit her to withdraw her plea of guilty and to enter a plea of not guilty. P. Br. at 1 n.1, 4; P. Ex. 1. Pursuant to the regulations, if Petitioner's conviction is reversed or vacated on appeal, she may seek reinstatement pursuant to 42 C.F.R. § 1001.3005.

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 federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(1) of the Act, effective April 20, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge