

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sue Ann Spece
(O.I. File No. H-16-4-0751-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-560

Decision No. CR4718

Date: October 4, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services notified Petitioner, Sue Ann Spece, that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years under 42 U.S.C. § 1320a-7(a)(1). Petitioner requested a hearing before an administrative law judge (ALJ) to dispute the exclusion. I conclude that the IG has a basis for excluding Petitioner from program participation for five-years.

I. Background

In an April 29, 2016 letter, the IG notified Petitioner that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years under 42 U.S.C. § 1320a-7(a)(1). The exclusion was based on Petitioner's felony conviction "in the Iowa District Court for Buchanan County, of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program." IG Exhibit (Ex.) 1.

Petitioner timely requested a hearing to dispute the exclusion. I was assigned to hear and decide this case. On June 8, 2016, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated June 9, 2016. Pursuant to the Order, the IG filed a brief (IG Br.) and eight exhibits (IG Exs. 1-8). Petitioner filed a response brief (P. Br.) with seven exhibits (P. Exs. 1-7). The IG filed a reply brief (IG Reply).

II. Decision on the Record

Neither party objected to any of the proposed exhibits. Therefore, I admit them all into the record. *See* Order ¶ 4; 42 C.F.R. §§ 1005.4(b)(10), 1005.8(c).

Because both parties indicated that a hearing is not necessary in this case and that they did not have any witnesses to offer, I decide this case on the basis of the written record. IG Br. at 7-8; P. Br. at 11.

III. Issue

Whether the IG has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for five years pursuant to 42 U.S.C. § 1320a-7(a)(1). *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

IV. Jurisdiction

I have jurisdiction to adjudicate this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. §§ 1001.2007, 1005.2.

V. Findings of Fact, Conclusions of Law, and Analysis¹

The IG must exclude an individual from participation in Medicare, Medicaid, and all other federally-funded health care programs if that individual “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.” 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.101(a).

- A. Petitioner entered an Alford plea of guilty to one count of Tampering with Records in violation of Iowa Code § 715A.5, and the Iowa District Court for Buchanan County (District Court) accepted that plea and ordered a deferred judgment, which included two years of probation and restitution to the Iowa Medicaid program.***

¹ My findings of fact and conclusions of law are set forth in italics and bold font.

Petitioner is the mother of three adult children who suffer from spinal muscular atrophy, which is a genetic condition resulting in severe muscle weakness and physical disability that worsens slowly over time. The muscle weakness impacts breathing, swallowing, and the gastrointestinal system, and all three of Petitioner's children need powered wheelchairs for mobility. Petitioner's children require assistance 24 hours a day. Although the needs of each child vary, one of Petitioner's children is "totally dependent upon caretakers to perform activities of daily living." P. Ex. 2 at 1. Petitioner provided assistance to all three children and received compensation from the Iowa Medicaid program as Consumer Directed Attendant Care (CDAC). P. Ex. 1 at 1.

CDAC is a program that assists disabled individuals to remain in their homes by hiring individuals to provide skilled medical care and unskilled services. Unskilled services include assistance with normal daily life activities, such as housekeeping, fixing meals, shopping, getting dressed, taking a bath, and going to the doctor. IG Ex. 5 at 2. With certain exceptions, a family member can provide services for the disabled individual. IG Ex. 5 at 3. Each provider of services must sign a CDAC provider agreement. IG Ex. 5 at 5; *see also* P. Ex. 5. Further, the provider must keep accurate records indicating the date, time, and specific type of services performed. IG Ex. 6; *see also* P. Ex. 5 at 11; P. Ex. 7 (examples of CDAC daily service records). The provider must maintain these records for at least five years. IG Ex. 5 at 6; *see also* P. Ex. 5 at 11.

On February 10, 2015, Iowa's Medicaid Fraud Control Unit initiated an investigation into Petitioner out of concern that Petitioner could not provide all of the services for three adult children that she claimed under the CDAC program. IG Ex. 4 at 3. The investigator assigned to this matter demanded that Petitioner produce all records of the services she provided daily to her children for the last five years; however, it took over a month for Petitioner to provide them. IG Ex. 4 at 8-9. The investigator noted discrepancies in the records Petitioner provided and concluded that Petitioner had "mass-produced a significant amount of CDAC services logs after [the investigator's] preliminary request in order to avoid reimbursement of previous claims." IG Ex. 4 at 3; *see also* P. Ex. 6 at 8 (investigator testifying that "if a provider is not able to provide records that have been requested of them that they're required to keep, then they may be liable to pay the money back to Medicaid for which they don't have any documentation of services.").

On September 28, 2015, the investigator signed a Complaint and Affidavit alleging that:

Evidence indicates that [Petitioner] retroactively mass-produced CDAC daily records, which are required to be maintained on a contemporaneous basis, after they were requested of her as part of this investigation. Consequently, services documented from 6/14/13-6/15/13, on 3/5/14, from 6/26/14 to 6/28/14, and from 7/9/14 to 7/10/14, do not

accurately represent services that may or may not have been provided by [Petitioner] on these days. This resulted in \$705.77 in CDAC services to be misrepresented and billed for by [Petitioner].

IG Ex. 2 at 1. On October 13, 2015, the Buchanan County Attorney filed a Trial Information with the District Court charging Petitioner with Fraudulent Practice in the Third Degree (Count I) and Tampering with Records (Count II). IG Ex. 3 at 1.

On March 16, 2016, Petitioner entered an *Alford* guilty plea to violating Count II of the Trial Information and requested that the District Court enter a deferred judgment against her. IG Ex. 6. On March 18, 2016, the District Court accepted Petitioner's guilty plea, entered a deferred judgment, and sentenced Petitioner to two years of probation. Petitioner was ordered to pay \$705.77 in financial damages to the Iowa Medicaid program and \$3,983.75 for the cost of the Medicaid Fraud Control Unit's investigation. IG Ex. 4 at 12-13; IG Ex. 8; *see also* IG Ex. 7 at 1-2.

B. Petitioner was convicted of a criminal offense for the purposes of 42 U.S.C. § 1320a-7(a)(1).

Under 42 U.S.C. § 1320a-7(a)(1), Petitioner must be “convicted of a criminal offense” before she can be excluded. An individual is considered “convicted” when a federal, state, or local court accepts a plea of guilty or no contest, or when an individual enters into participation in a first offender, deferred adjudication or other program where judgment of conviction has been withheld. 42 U.S.C. § 1320a-7(i)(3), (4).

In the present matter, Petitioner entered an *Alford* guilty plea to Tampering with Records under Iowa Code § 715A.5, and the District Court accepted that plea. IG Ex. 6; IG Ex. 7 at 1. An *Alford* guilty plea is the same as a guilty plea for exclusion purposes. *Rudman v. Leavitt*, 578 F. Supp. 2d 812, 815 (D. Md. 2008).

Further, the District Court entered a deferred judgment against Petitioner. IG Ex. 7 at 1. A deferred judgment in Iowa permits a court to place a defendant on probation with conditions, the successful completion of which will result in discharge of the case without a judgment of conviction; however, if the defendant violates the conditions, the court may impose a sentence. Iowa Code § 907.3(1). This deferral of judgment is a conviction for exclusion purposes. *See Travers v. Shalala*, 20 F.3d 993, 996-98 (9th Cir. 1994).

C. Petitioner's criminal conviction related to the delivery of items or services under the Medicaid program.

An individual must be excluded from participation in any federal health care program if the individual was 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. 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.101(a). A state health care program includes a state's Medicaid program. 42 U.S.C. § 1320a-7(h)(1); 42 C.F.R. § 1001.2 (definition of *State health care program*).

The statute's requirement that the conviction be "related to" the delivery of health care items or services means that there only needs to be a nexus or common sense connection between the offense and the delivery of an item or service under a relevant program. *See Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "relating to" as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation") (internal quotes omitted); *Quayum v. U.S. Dep't of Health & Human Servs.*, 34 F. Supp. 2d 141, 143 (E.D.N.Y. 1998).

In the present case, Petitioner was a provider in Iowa's CDAC Medicaid program. As a provider, Petitioner billed Medicaid for the assistance she rendered to her adult children. However, Petitioner was obligated to document the services she provided and retain that information for at least five years. Petitioner failed to always document the services she provided and, when called upon by a criminal investigator to produce the documentation of her services, Petitioner generated documents and submitted them as if they had been created contemporaneously with the services she provided. As a result, she was convicted of Tampering with Records, which provides that:

A person commits an aggravated misdemeanor if, knowing that the person has no privilege to do so, the person falsifies, destroys, removes, or conceals a writing or record, with the intent to deceive or injure anyone or to conceal any wrongdoing.

Iowa Code § 715A.5.

Petitioner asserts that her crime does not relate to the delivery of items or services under the Medicaid program, but rather to obstructing an investigation under 42 U.S.C. § 1320a-7(b)(2). P. Br. at 11. Petitioner may be correct that she was convicted of a crime related to concealing a wrongdoing that could have been criminal conduct excludable under 42 U.S.C. § 1320a-7(a) or (b)(1). However, simply because a permissive exclusion could be applied to a person, it does not follow that a mandatory exclusion could not be imposed on that same individual. *Timothy Wayne Hensley*, DAB No. 2044 (2006).

The District Court ordered Petitioner to pay restitution in the amount of \$705.77 as financial damages to the Medicaid program. *See* IG Ex. 7 at 1-2; IG Ex. 8. It is possible that the District Court ordered this restitution based on the dismissed Count I, as

Petitioner asserts. P. Br. at 10. However, it is certain that the District Court ordered this pursuant to the plea agreement that Petitioner entered into with the County Attorney. IG Ex. 6 at 4; IG Ex. 7 at 3.

It is well settled that payment of restitution is evidence of program loss. *E.g., Craig Richard Wilder*, DAB No. 2416 at 9 (2011). Where an individual is convicted of a crime, “proof that any sentence based on that conviction included the payment of restitution to a protected program creates a rebuttable presumption of a nexus or common-sense connection between the conviction and the delivery of an item or service under [that] program.” *Johnnelle Johnson Bing*, DAB CR1938 at 6 (2009) (citing *Alexander Nepomuceno Jamias*, DAB CR1480 (2006)). Petitioner asserts that this presumption has been rebutted since restitution was paid based on the dismissed Count I. However, because Petitioner agreed to pay restitution to the Medicaid program in an amount based on the improper CDAC documentation she provided the investigator (IG Ex. 2 at 1), I disagree with Petitioner and conclude that it is sufficient evidence of a nexus between Petitioner’s conviction and the delivery of items or services under the Medicaid program.

D. Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B).

Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(1), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

I note that exclusion in this matter does not serve a useful purpose. The investigator who brought the criminal charges against Petitioner admitted that Petitioner “probably puts in more time [serving her adult children] beyond what she is able to bill.” P. Ex. 6 at 12. Indeed, the record shows that Petitioner’s care for her children is constant, extensive, and effective. P. Ex. 1 at 2-3; P. Ex. 2 at 4; P. Ex. 2 at 5 (“[Petitioner’s] diligence as a caregiver is evident from the fact that [Petitioner’s three adult children] have largely avoided pressure sores or other complications.”) Petitioner’s exclusion places her adult children in the position of potentially having to reside at a long term care facility, which will not only cost the Medicaid program significantly more money, but will result in a lower quality of life for the children. P. Ex. 1 at 1; P. Ex. 3. However, Congress mandated exclusion broadly for crimes related to the delivery of items or services under Medicaid, and the IG was required to impose at least a five-year exclusion and I am required to uphold that exclusion. *Travers*, 20 F.3d at 998.

Nevertheless, it is baffling as to why the Iowa Medicaid Fraud Control Unit thought it necessary to criminally prosecute Petitioner for misdemeanors based on a mere supposed loss of about \$700 to the Medicaid program knowing that exclusion would follow. *See* IG Ex. 4 at 11 (Iowa Medicaid Fraud Control Unit investigator noting that “HHS-OIG Exclusion documentation” was submitted on March 21, 2016). Petitioner has dedicated

her adult life to caring for her disabled children. It is easy to understand that, day after day, Petitioner provides essentially the same services for her children, which Petitioner did not always document, probably owing to unremitting efforts to care for them. No doubt, Petitioner reacted incorrectly when she realized she did not have all of the documentation requested of her by the investigator; however, there is no evidence that she failed to perform all services expected of her under the CDAC program. Exclusion of Petitioner for five years for the mistake she made related to documentation is harsh and ultimately irrational.

VI. Conclusion

For the foregoing reasons, I affirm the IG's determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for the statutory five-year minimum period pursuant to 42 U.S.C. § 1320a-7(a)(1), (c)(3)(B).

/s/
Scott Anderson
Administrative Law Judge