Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Tonya Ann Sohm
(a.k.a. Tonya Ann Clausen),

Petitioner

v.

The Inspector General.

Docket No. C-10-373

Decision No. CR2139

Date: May 28, 2010

DECISION

Petitioner, Tonya Ann Sohm, asks review of the determination of the Inspector General (I.G.) to exclude her for five years from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(1) of the Social Security Act. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner and that the statute mandates a minimum five-year exclusion.

I. Background

Petitioner was a registered nurse employed by a Medicare-certified long term care facility, Willow Dale Wellness Village, located in Battle Creek, Iowa. I.G. Exs. 4, 11. She stole from her employer prescription drugs (hydrocodone) that had been ordered for facility residents. I.G. Exs. 4, 10, 11, 12, 13, 14, 15, 16. She was charged with obtaining a Schedule II controlled substance, a felony, and possession of a controlled substance, a serious misdemeanor. I.G. Ex. 5. On January 2, 2008, she pled guilty in an Iowa State Court to the misdemeanor count of possession of a controlled substance. I.G. Exs. 6, 7. The court entered an order of deferred judgment. I.G. Ex. 9.

In a letter dated December 31, 2009, the I.G. advised Petitioner that, because she had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or state health care program, the I.G. was excluding her from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. CMS Ex. 1. Section 1128(a)(1) of the Social Security Act (Act) authorizes such exclusion. I.G. Ex. 1.

The parties agree that an in-person hearing is not required and that the matter may be resolved based on written submissions. I.G. Br. at 8; P. Br. at 7. The parties have submitted their briefs. With its brief, the I.G. submitted sixteen exhibits (I.G. Exs. 1-16). Petitioner submitted no additional exhibits. The I.G. filed a reply brief.

Although Petitioner objects to the purposes for which some of the I.G.'s exhibits have been submitted (see discussion below), she has not objected to the admission of any specific document. P. Br. at 3. In the absence of any specific objections, I admit into evidence I.G. Exs. 1-16.

II. Issue

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from program participation. Because an exclusion under section 1128(a)(1) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

III. Discussion

> ***Petitioner must be excluded for five years, because she was convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health program, within the meaning of section 1128(a)(1) of the Social Security Act.***[1]

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services exclude an individual who has been 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.[2] 42 C.F.R. § 1001.101.

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[1] I make this one finding of fact/conclusion of law.

[2] The term "state health care program" included a state's Medicaid program. Act § 1128(h)(1); 42 C.F.R. § 1320a-7(h)(1).

Petitioner concedes that she was convicted of a criminal offense within the meaning of the statute and regulations. P. Br. at 1. She argues that she is not subject to exclusion, because the I.G. has not established that her crime was "related to" the delivery of a healthcare item or service under Medicare or any state health care program. An offense is related to the delivery of an item or service under Medicare or a state health care program if there is "a nexus or common-sense connection" between the conduct giving rise to the offense and the delivery of the item or service. *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Berton Siegel, D.O.*, DAB No. 1467 (1994).

Petitioner objects to my consideration of any evidence "submitted for the purpose of meeting the 'related to' requirement" other than the information (I.G. Ex. 5), plea agreement (I.G. Ex. 6), guilty plea and waiver (I.G. Exs. 7, 8), and the criminal court's order deferring judgment (I.G. Ex. 9). In Petitioner's view, I should consider only those exhibits that "set forth the offense that served as the basis of the deferred judgment and the factual basis for her plea to that offense." P. Br. at 3. So long as I exclude the remaining extraneous evidence, Petitioner argues, the I.G. will not be able to show a connection between her offense and Medicare or a state health care program. With her plea, Petitioner admitted only that, on October 5, 2007, she possessed hydrocodone without a valid prescription, and, according to Petitioner, the I.G. is not able to tie the specific drugs in her possession on that day to any program beneficiary.

I note first that Petitioner's view of the evidence I may consider is unacceptably narrow. It is well-settled that the I.G. may rely on extrinsic evidence to explain the circumstances underlying a conviction. The regulations specifically provide that evidence of "crimes, wrongs, or acts other than those at issue in the instant case is admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme." 42 C.F.R. §1005.17(g). *See Narendra M. Patel*, DAB No. 1736 (2000); *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Bruce Lindberg, D.C.*, DAB No. 1280 (1991).

Here, extrinsic -- and admissible -- evidence establishes that Petitioner was engaged in a scheme to steal drugs from the supply her employer maintained for facility residents. I need not address whether stealing drugs from a facility housing Medicare and Medicaid beneficiaries is, by itself, sufficient to establish relatedness, because the I.G. has directly linked to particular program beneficiaries drugs that she stole on October 5, 2007.

As the evidence establishes, the facility generally stored medications that had been ordered and prescribed for specific residents (although it also maintained "emergency kits" of single doses of prescription drugs). I.G. Ex. 11. On October 5, 2007, facility staff found hidden in the medication room full and empty hydrocodone medication cassettes belonging to current and former residents. The narcotic had not been counted or recorded when it arrived at the facility. Petitioner admitted to the facility administrator and the director of nursing that she had been diverting the drugs for her personal use.

I.G. Ex. 12, at 3. Among the drugs she took on October 5, 2007, were 16 tablets from a prescription cassette that had been ordered for E.M., a Medicaid beneficiary, and 16 additional tablets from a cassette that had been ordered for V.C., also a Medicaid beneficiary. I.G. Ex. 13, at 1 (Judisch Decl. ¶¶ 3, 4, 5, 6). In addition, the facility's assistant administrator identified four Medicare beneficiaries and two additional Medicaid beneficiaries from whom Petitioner stole drugs. I.G. Ex. 11, at 2 (Johnson Decl.). I find these facts sufficient to create a nexus between Petitioner's crime and the Medicare and Medicaid programs.

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and I sustain the five-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge