Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Charice D. Curtis,

Petitioner

v.

The Inspector General.

Docket No. C-11-425

Decision No. CR2430

Date: September 16, 2011

DECISION

This matter is before me in review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Charice D. Curtis from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s determination to exclude Petitioner is based on the terms of section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). The facts of this case mandate the imposition of a five-year exclusion, and so I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner Charice D. Curtis is a registered nurse. During the spring and early summer of 2008 she was employed as the nurse administrator in the Evansville, Indiana office of Omni Home Care (Omni). Omni provides home health care services to approximately 30 communities in five states, including Indiana. Beginning in April 2008, Petitioner fraudulently opened a credit card account in Omni's name and used that credit card account to buy approximately $304,319 in gift cards over a seven-week period. In late June 2008, she attempted to obtain additional gift cards worth $265,000, but Omni officials learned of her plan and filed a criminal complaint with local authorities.

Petitioner and a co-defendant named Kathina Reynolds, the manager of Omni's Evansville office, were arrested when they attempted to obtain the additional gift cards. When questioned, Petitioner asserted that the gift cards were intended to be used as bonus awards for Omni employees, although she later admitted having used some of the gift cards to purchase major household appliances and other merchandise for herself.

Federal authorities took over the investigation in September 2008, and on January 7, 2009, the Federal Grand Jury sitting for the United States District Court for the Western District of Kentucky handed up an Indictment charging Petitioner and Reynolds with two felony counts of Fraud in Connection with Access Devices, in violation of 18 U.S.C. § 1029(a)(2), (a)(3), (b)(1), and (c)(1)(A)(i). On July 29, 2009, Petitioner appeared with counsel in the United States District Court and pleaded guilty to both charges. She was sentenced on March 19, 2009, to a 15-month term of imprisonment, was assessed $200, and was ordered to pay restitution to the credit card issuer in the sum of $90,947.

As required by the terms of section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. On February 28, 2011, the I.G. notified Petitioner that she was being excluded pursuant to the terms of section 1128(a)(3) of the Act for the mandatory minimum period of five years.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action by letter dated April 24, 2011. I convened a telephonic prehearing conference on May 24, 2011, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing those issues. By Order of May 26, 2011, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case closed on August 30, 2011.

There are eight exhibits in this case. The I.G. proffered five exhibits marked I.G. Exhibits 1 through 5 (I.G. Exs. 1-5), and they are admitted without objection. For purposes of clarity, I note that Petitioner's Answer Brief (P. Ans. Br.) in letter form dated July 22, 2011, and her Response Brief (P. Resp. Br.) in letter form dated August 22, 2011, were both marked "Petitioner's Exhibit 1." I have not treated them as exhibits, but have considered them as Petitioner's opening and final briefs. Petitioner's actual evidentiary proffer was made up of three exhibits marked Petitioner's Exhibits 2, 3, and 4 (P. Exs. 2, 3, and 4). The I.G. objected to P. Exs. 2 and 3, but I have admitted them under the circumstances set out in my letter of August 9, 2011, and the Order of September 1, 2011.

II. Issues

The issues before me are limited to those listed at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(3) of the Act; and

2. Whether the length of the proposed period of exclusion is unreasonable.

Both issues must be resolved in favor of the I.G.'s position. Because her predicate conviction has been established, there is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act. A five-year term of exclusion is the minimum established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B) and is therefore not unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "[a]ny individual or entity that has been convicted for an offense which occurred after [August 21, 1996,] under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in [section 1128(a)](1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." The terms of section 1128(a)(3) are restated in similar language at 42 C.F.R. § 1001.101(c).

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court," Act § 1128(i)(1); "when there has been a finding of guilt against the individual . . . by a Federal . . . court," Act § 1128(i)(2); or "when a plea of guilty . . . by the individual . . . has been accepted by a Federal . . . court," Act § 1128(i)(3). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(3) is mandatory and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B); 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

IV. Findings and Conclusions

I find and conclude as follows:

1. On her accepted plea of guilty on July 29, 2009, in the United States District Court for the Western District of Kentucky, Petitioner Charice D. Curtis was found guilty of two

felony counts of Fraud in Connection with Access Devices, in violation of 18 U.S.C. § 1029(a)(2), (a)(3), (b)(1), and (c)(1)(A)(i). I.G. Exs. 2, 3, 5; P. Ex. 2.

2. Final judgment of conviction was entered against Petitioner and she was sentenced on her guilty pleas in the United States District Court on March 19, 2010. I.G. Ex. 2.

3. The judgment of conviction, finding of guilt, and accepted pleas of guilty described above in Findings 1 and 2 constitute a "conviction" within the meaning of sections 1128(a)(3) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.

4. There is a nexus and a common-sense relationship between the felony offenses of which Petitioner was convicted, as noted above in Findings 1, 2, and 3 above, and fraud in connection with the delivery of a health care item or service. I.G. Exs. 2, 3, 5; P. Exs. 2, 3.

5. Petitioner's conviction as noted above in Findings 1, 2, 3, and 4 constitutes a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Act § 1128(a)(3); 42 U.S.C. § 1320a-7(a)(3).

6. The five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, and is therefore not unreasonable. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

7. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, *or* the felony offense must have been with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the felonious conduct must have occurred after August 21, 1996. *Andrew D. Goddard*, DAB No. 2032 (2006); *Kenneth M. Behr*, DAB No. 1997 (2005); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Jeremy Robinson*, DAB No. 1905 (2004); *Breton Lee Morgan, M.D.*, DAB CR1913 (2009); *Morganna Elizabeth Allen*, DAB CR1479 (2006); *Theresa A. Bass*, DAB CR1397 (2006); *Michael Patrick Fryman*, DAB CR1261 (2004); *Golden G.*

Higgwe, D.P.M., DAB CR1229 (2004); *Thomas A. Oswald, R.Ph.*, DAB CR1216 (2004); *Katherine Marie Nielsen*, DAB CR1181 (2004).

Petitioner does not deny that she was convicted of two felony offenses and does not dispute that her felonious conduct occurred after August 21, 1996. She does not explicitly dispute the relation of the conduct underlying her convictions to fraud or theft, but that relationship is conceded by her admissions that she had no authorization from Omni to open and use the credit card account in its name, and that she was able to do so only because of her administrative position at Omni. P. Ans. Br. at 1. Thus, there appears to be no challenge to the I.G.'s proof of the first, second, and fourth essential elements set out above. I find that the I.G. has proven those elements.

Petitioner argues that the conduct underlying her felony convictions is insufficient to satisfy the third essential element: "I truly do not feel that it is connected to the delivery of a healthcare item or service." P. Ans. Br. at 1. She correctly points out that her conduct did not include theft of a patient's identity or submission of false billings for goods or services. But her argument fails to appreciate the broad reading that must be given to the phrase "in connection with the delivery of a health care item or service . . . ."

The Departmental Appeals Board (Board) has repeatedly emphasized that the phrase does not require that an individual participate directly in the actual delivery of an item or service in order to be subject to exclusion. What the Board has held the phrase does require is that a "common sense connection or nexus" between the offense and the delivery of a health care item or service be established after an analysis of the specific facts involved. *Kevin J. Bowers*, DAB No. 2143 (2008); *Andrew D. Goddard*, DAB No. 2032; *Kenneth M. Behr*, DAB No. 1997; *Erik D. DeSimone, R. Ph.*, DAB No. 1932. It is significant to any such analysis that the performance of management or administrative services in the delivery of such items or services is explicitly included in the provision's reach. 42 C.F.R. § 1001.101(c)(1).

In this case, it is uncontested that Omni was and is a multi-state provider of home health care services. Petitioner was Omni's nurse administrator in Omni's Evansville, Indiana, office. I.G. Ex. 3; P. Ex. 2. She and three other subordinate members of the administrative staff in that office — including the office manager Reynolds, the patient care director, and the Omni administrator responsible for that office's medical records — formed a plan to create a gift card bonus program for Omni employees to be funded in the short term through a credit card account they planned to open in Omni's name. I.G. Exs. 3, 5; P. Ex. 2. It was a necessary part of the plan that Petitioner and the co-defendant Reynolds used their official positions with Omni to obtain the credit card account. P. Ans. Br. at 1. Omni was unaware of its four administrators' plan to establish a bonus program for its employees, of the application for a credit card account, or of the eventual use of that account to purchase almost a third of a million dollars' worth of gift cards. I.G. Exs. 3, 5; P. Ex. 2. Before Omni discovered and stopped the program,

Petitioner's completed distributions of the unauthorized gift-card bonuses to Omni employees amounted to at least $40,000, with another several thousand dollars in gift cards spent on food, supplies, and decorations for Omni office functions and staff meetings — including pedicures for Reynolds and another administrator following office meetings. P. Ex. 3.

It is perfectly true that nothing in this record suggests that Medicare, Medicaid, or any other federally-funded health care program was harmed in any way by anything Petitioner did in obtaining and using the Omni credit card. But it is just as clear that Petitioner's fraudulent opening of the Omni account was "in connection with" her employment at Omni. She could not have succeeded in doing so without holding a position of responsibility at Omni. She formed and executed her plan with the agreement of three other Omni administrators acting in their managerial roles. Her goal, at least at first, was to reward and encourage Omni employees under her supervision. Some of the gift cards were given as lagniappe to Omni administrators for attending Omni meetings. Most of the gift cards that were actually distributed went to Omni employees.

There is an obvious "common sense connection" between Petitioner's activity and Omni's function in delivering home health care items and services. The motive of Petitioner's criminal activity was to encourage and reward Omni employees under her supervision. The means by which she carried out her criminal activity were Omni's creditworthiness and the credit card account she obtained by relying on it. And the opportunity for bringing the entire criminal plan to fruition was her position of responsibility as Omni's nurse administrator in the local office. On these facts, the nexus between crime and health care is far stronger than in *Susan Malady*, DAB CR835 (2001) and *Donald R. Hicks, M.D.*, DAB CR765 (2001), cases in which Administrative Law Judges of this forum have found the "common sense connection" and "nexus" tests satisfied by a showing that an individual holding a position of responsibility with a health care provider abused that position to the provider's financial detriment, *even in the absence of a showing that the ultimate beneficiaries of the peculations may have been employees or programs of the provider itself.*

The five-year period of exclusion proposed in this case is the minimum required by section 1128(c)(3)(B) of the Act. As a matter of law it is not unreasonable, and neither the Board nor I can reduce it. 42 C.F.R. § 1001.2007(a)(2); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

I note once more that Petitioner appears here *pro se*. Because of that I have been guided by the Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991). I have searched all of Petitioner's pleadings for any arguments or contentions that might raise a valid, relevant defense to the I.G.'s Motion, but have found nothing that could be so construed.

Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law. The Decision issues accordingly.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Charice D. Curtis from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, pursuant to the terms of section 1128(a)(3) of the Act, is sustained.

/s/
Richard J. Smith
Administrative Law Judge