

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rebecca Bailey Harvey, LCSW
(OI File No. H-12-40978-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-1254

Decision No. CR2713

Date: March 5, 2013

DECISION

The Inspector General (I.G.) of the Department of Health and Human Services notified Rebecca Bailey Harvey, LCSW (Petitioner) that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years pursuant to 42 U.S.C. § 1320a-7(a)(1). I find that the I.G. has a basis for excluding Petitioner from program participation and that the five-year exclusion is reasonable as a matter of law.

I. Background

By letter dated July 31, 2012, the I.G. notified Petitioner, a licensed clinical social worker, that she was being excluded from Medicare, Medicaid, and all federal health care programs for a minimum period of five years pursuant to section 1320a-7(a)(1). I.G. Ex. 1. The I.G. advised Petitioner that the exclusion was based on her conviction “in the 437th District Court, Bexar County, Texas of a criminal offense related to the delivery of an item or service under the Medicare program 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.” I.G. Ex. 1, at 1.

Petitioner timely filed her August 21, 2012 request for hearing (RFH) and this case was assigned to me for hearing and decision. On October 17, 2012, 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 October 17, 2012. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on November 15, 2012, with I.G.'s exhibits (I.G. Exs.) 1 through 6. Petitioner filed a response (P. Br.), which our office received on January 3, 2013. Petitioner did not submit any proposed exhibits. The I.G. filed a reply brief (I.G. Reply) on January 9, 2013. Absent objection, I admit CMS Exs. 1 - 6 into the record. Additionally, both parties indicated that an in-person hearing was unnecessary (I.G. Br. at 4-5; P. Br. at 2); therefore, I issue this decision on the basis of the written record.

II. Issue

Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1).

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

A. Petitioner pled nolo contendere to the offense of theft from the Texas Medicaid program and received deferred adjudication.

Petitioner is a licensed social worker. The Texas State Health and Human Services Commission, Medicaid Provider Integrity, Office of Inspector General investigated Petitioner for billing Texas Medicaid for counseling services that were not provided. I.G. Ex. 6, at 1. On July 2, 2009, Petitioner was indicted on one count of Theft under Texas Penal Code 31.03, and on one count of Medicaid Fraud under Texas Penal Code 35A.02. I.G. Exs. 5; 6, at 2. According to the indictment, beginning on or about September 17, 2001 through on or about October 27, 2006, Petitioner knowingly made false statements or misrepresentations of material facts when she billed for work that was not performed in order to receive payments under the Medicaid program in excess of \$20,000, but less than \$100,000. I.G. Ex. 5. The indictment further charged that Petitioner made false statements or misrepresentations, without the effective consent of the owner but through deception, with the intent to deprive the Texas Medicaid Program of an amount in excess of \$20,000, but less than \$100,000, pursuant to one scheme or continuing course of conduct. I.G. Ex. 5.

On December 9, 2011, Petitioner entered into a plea agreement to plead "open" and *nolo contendere* to the lesser included offense of Theft: \$1,500 - \$20,000. I.G. Ex. 2, 3. On March 9, 2012, a Texas District Court Judge sentenced Petitioner according to the

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

agreement, ordered Petitioner to remit \$41,070.25 in restitution; serve 240 hours of community service; pay court costs of \$310; and pay a \$500 fine. I.G. Exs. 3, 4, and 6. In accordance with the plea agreement, the judge ordered Deferred Adjudication for 3 years. I.G. Exs. 3, 4.

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

Petitioner's primary defense to exclusion is that she has not been convicted of a crime. RFH at 1; P. Br. at 1-2. Under 42 U.S.C. § 1320a-7(a)(1), Petitioner must be "convicted of a criminal offense." Petitioner argues that she only pled *nolo contendere* and that she entered into deferred adjudication. RFH at 1; P. Br. at 1-2. The record confirms these admissions: signed plea bargain (I.G. Ex. 2) and order of deferred adjudication (I.G. Exs. 3, 4). However, for the purposes of a violation under 42 U.S.C. § 1320a-7(a)(1), the term "convicted" includes "when a plea of guilty or *nolo contendere* by the individual . . . has been accepted by a Federal, State, or local court" and "when the individual . . . has entered into participation in a first offender, deferred adjudication . . . where judgment of conviction has been withheld." 42 U.S.C. § 1320a-7(i); *see also* 42 C.F.R. § 1001.2. Therefore, Petitioner was convicted of a criminal offense within the meaning of the statute.

C. Petitioner's conviction requires exclusion under 42 U.S.C. § 1320a-7(a)(1) because her criminal conduct related to the delivery of an item or service 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). In the present case, the record fully supports this conclusion. Specifically, Count 1 of the indictment against Petitioner charged her with unlawfully appropriating, through deception, between \$20,000 and \$100,000 from the State of Texas, Texas Medicaid Program, or the Texas Health and Human Services Commission. I.G. Ex. 5, at 1. Petitioner pled to a lesser included offense from this charge (i.e., the amount of money subject to the theft was decreased to between \$1,500 and \$20,000). I.G. Ex. 2. Further, the Closing Summary Memo of the investigation makes it clear that Petitioner was billing Texas Medicaid for services she was not providing. I.G. Ex. 6. Medicaid is a "State health care program" for exclusion purposes. 42 C.F.R. § 1001.2. Therefore, Petitioner's conviction is directly related to the delivery of services under a state healthcare program. I conclude that the record fully supports Petitioner's mandatory exclusion under section 1320a-7(a)(1). I.G. Exs. 2-6.

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. § 1001.2007(a)(2). Petitioner argues that a five-year exclusion is “very excessive” given that she already fully paid restitution. P. Br. at 2; *see also* RFH at 1. However, the payment of restitution does not affect the length of exclusion because doing so is “merely carrying out part of [a] court ordered sentence.” *Sushil Aniruddh Sheth*, M.D., DAB No. 2491, at 11 (2012). In any event, the statute does not give me discretion to reduce the length of exclusion below the minimum period of five years and I conclude that the five-year exclusion imposed by the I.G. is not unreasonable as a matter of law.

IV. Conclusion

For the foregoing reasons, I sustain the I.G.’s determination to exclude Petitioner from participating in Medicare, Medicaid, and all 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