Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Terri M. Smith a.k.a. Terri M. Clemens[1]
(OI File No. H-12-40574-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-1253

Decision No. CR2742

Date: April 1, 2013

DECISION

The Inspector General (I.G.) of the Department of Health and Human Services notified 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 under 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 mandated by law.

I. Background

In a June 29, 2012 letter, the I.G. notified Petitioner that she was being excluded from Medicare, Medicaid, and all federal health care programs for the minimum statutory

[1] In the June 29, 2012 exclusion notice that Petitioner now appeals, the Inspector General indicated that Petitioner is known by the alias of "Terri Bennet." At the October 16, 2012 prehearing conference in this case, Petitioner denied ever having used the surname "Bennet." In response to Petitioner's objection, the Inspector General agreed to the removal of "Terri Bennet" from the caption. Informal Brief of the Inspector General at 7. Therefore, the caption is amended and the alias of "Terri Bennet" is removed from it.

period of five years under 42 U.S.C. § 1320a-7(a)(1). I.G. Ex. 1. The exclusion was due toher conviction "in the Iowa District Court for Monona 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." I.G. Ex. 1, at 1.
Petitioner timely filed a request for hearing (RFH) and this case was assigned to me for hearing and decision. On October 16, 2012, I convened a prehearing conference by telephone, the substance of which is summarized in my October 17, 2012 Order and Schedule for Filing Briefs and Documentary Evidence (Order). *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on November 16, 2012, with I.G.'s exhibits (I.G. Exs.) 1 through 5. Petitioner filed a response (P. Br.), which our office received on December 27, 2012. Petitioner submitted exhibits (P. Exs.) 1 through 14 with her brief. The I.G. filed a reply brief (I.G. Reply) on January 15, 2013, with I.G. Ex. 6. Absent objection, I admit I.G. Exs. 1-6 and P. Exs. 1-14 into the record. Additionally, both parties indicated that an in-person hearing was unnecessary (I.G. Br. at 6; P. Br. at 2); therefore, I issue this decision on the basis of the written record.

II. Issue

The issue before me is whether the I.G. has a basis for excluding Petitioner for five years from participating in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1). *See* 42 C.F.R. §1001.2007(a).

III. Findings of Fact, Conclusions of Law, and Analysis[2]

The Secretary of Health and Human Services (Secretary) must exclude an individual from participation in any federal health care program if that individual has been convicted of a criminal offense related to the delivery of an item or service under Medicare or any state health care program.[3] 42 U.S.C. § 1320a-7(a)(1).

A. Petitioner entered an Alford plea in an Iowa court to one count of theft, a misdemeanor, and received a deferred judgment from the court.

Petitioner was the office manager and bookkeeper at Elmwood Care Center (Elmwood), a nursing home located in Onawa, Iowa. P. Br. at 6. On July 1, 2011, Petitioner was charged in a preliminary complaint with Theft in the Second Degree in violation of Iowa Code §§ 714.1(2) and 714.2(2). I.G. Ex. 2. According to the complaint, on or about

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[2] My findings of fact and conclusions of law are set forth in italics and bold font.

[3] The term "State health care program" includes a state's Medicaid program. 42 U.S.C. § 1320a-7(h)(1); 42 C.F.R. § 1001.2.

February 16, 2008, through June 2, 2011, in Onawa, Monona County, Iowa, Petitioner took possession of the checking account of a resident of Elmwood (Resident), who died on February 16, 2008, and did not report the monies in the account to the State of Iowa, as required by Iowa Code § 249A.5, to ensure that the Iowa Medicaid program properly recouped all monies possible at the time a Medicaid recipient dies. I.G. Ex. 2. On September 20, 2011, Petitioner entered an *Alford* plea to the amended (lesser) charge of Theft in the Fifth Degree, a simple misdemeanor, in violation of Iowa Code §§ 714.1(1), (2) and 714.2(5). I.G. Ex. 4; P. Exs. 1, 6. The Iowa District Court for Monona County accepted Petitioner's *Alford* plea and deferred judgment until March 20, 2012. I.G. Ex. 4; P. Exs. 1, 6. The court sentenced Petitioner to pay court costs and a $625 civil penalty, and ordered, as restitution, that all funds in the Resident's bank account be released, payable to the State of Iowa in care of the Medicaid Fraud Control Unit. I.G. Exs. 4, 5. On May 7, 2012, the court entered an Order Granting Final Discharge From Deferred Judgment, and Petitioner's record was expunged. P. Ex. 10. On July 10, 2012, in the Iowa District Court for Monona County, Petitioner filed a Motion to Withdraw Plea of Guilty. P. Ex. 6, at 1-4. On July 13, 2012, Petitioner withdrew her motion to withdraw her plea. I.G. Ex. 6.

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

For exclusion purposes, 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 a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction is withheld. 42 U.S.C. § 1320a-7(i).

Petitioner's primary defense to the I.G.'s imposition of exclusion is that she has not been convicted of a criminal offense. P. Br. at 2, 5-8. Petitioner contends that her criminal defense counsel and the prosecutor told her that if she entered an *Alford* plea, the plea would be expunged from her record and not affect her employment. RFH at 3.

Petitioner acknowledges that she entered an Alford plea to the lesser charge of Theft in the Fifth Degree, in violation of Iowa Code §§ 714.1(1), (2) and 714.2(5), but claims that because the Iowa court granted her a deferred judgment and subsequently expunged her record related to this plea and charge, no conviction was entered. P. Br. 10-11. Despite the fact that Petitioner's record has been expunged, under federal law, Petitioner is considered to have been convicted for purposes of exclusion.

An "*Alford* plea" is one by which a defendant maintains his innocence to a criminal charge, but pleads guilty because the defendant believes that the prosecutor has sufficient

evidence to obtain a conviction. *North Carolina v. Alford*, 400 U.S. 25, 37-39 (1970). Under 42 U.S.C. § 1320a-7(i)(3), an individual is considered to have been "convicted" when a plea of guilty has been accepted by a federal, state, or local court. That statutory provision is met by an *Alford* plea. *Rudman v. Leavitt*, 578 F.Supp.2d 812, 815 (D. Md. 2008). Thus, Petitioner's entry of an *Alford* plea and its acceptance by the Iowa court constitutes a conviction under 42 U.S.C. § 1320a-7(i)(3).

Further, under 42 U.S.C. § 1320a-7(i)(4), an individual who has entered into a deferred adjudication or other arrangement or program where judgment of conviction has been withheld is considered to have been "convicted." Petitioner's acceptance of deferred judgment following her entry of an *Alford* plea means that Petitioner has been convicted under the definition in 42 U.S.C. § 1320a-7(i)(4). *See Rudman*, 578 F.Supp.2d at 815.

Finally, although the Iowa court subsequently expunged Petitioner's record after she completed the requirements of her deferred judgment, this action by the court does not affect a determination under federal law as to whether she is considered to have been convicted. *See Travers v. Shalala*, 20 F.3d 993, 996 (9th Cir. 1994) ("[w]hat constitutes a 'conviction' under [42 U.S.C. 1320a-7] . . . is determined by federal law, not state law."). Under 42 U.S.C. § 1320a-7(i), an individual is still considered to be convicted regardless as to whether a criminal judgment has been expunged. *See Rudman*, 578 F.Supp.2d at 815; *Gupton v. Leavitt*, 575 F. Supp. 2d 874, 879-881 (E.D. Tenn. 2008). Therefore, for purposes of 42 U.S.C. § 1320a-7(a)(1), Petitioner is considered to be convicted of a criminal offense despite the action of the state court to expunge her record.

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 Medicaid.

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.[4] 42 U.S.C. § 1320a-7(a)(1). As discussed below, Petitioner's *Alford* plea for theft from a resident at a nursing home who was a recipient of Medicaid provides a sufficient nexus to the delivery of items or services under the Medicaid program to uphold the I.G.'s exclusion.

One of Petitioner's duties as the office manager at Elmwood was "to make deposits, write checks and make withdrawals on [the Resident's] behalf." P. Br. at 6. Petitioner was a co-signer on the Resident's checking account, and wrote checks on the Resident's behalf to pay her monthly fees for residing at Elmwood and to purchase items the Resident

[4] Medicaid is a "State health care program" for purposes of 42 U.S.C. § 1320a-7(a)(1). 42 C.F.R. § 1001.2.

needed. RFH at 2; P. Ex. 3, at 2. Petitioner's duties also included notifying the Iowa Medicaid Estate Recovery program when an Elmwood resident who was a Medicaid recipient died. P. Br. at 6.

Although the original charge against Petitioner stated that she was accused of theft in the second degree under Iowa law, specifically taking possession of the Resident's checking account after she died on February 16, 2008, and failing to report the monies in the account to the State of Iowa as required by Iowa Code § 249A.5, to ensure that the Iowa Medicaid program properly recouped all monies paid on behalf of the Resident, I am only concerned with the offense to which Petitioner pled guilty. Based on the evidence of record, it appears that Petitioner's *Alford* plea related to the withdrawal of $60.00 from the Resident's bank account on August 30, 2010, (I.G. Ex. 3; P. Ex. 7) because Petitioner's plea was to fifth degree theft, which means that it involved theft of less than $200. Iowa Code § 714.2(5). The original charge of second degree theft had to involve an alleged amount of theft between $1,000 and $10,000, or a range that included the full value of the Resident's bank account in Petitioner's care.[5] Iowa Code § 714.2(2). In any event, the record is clear that the *Alford* plea to theft relates in some way to Petitioner's possession of the Resident's bank account well after the Resident's death, as evidenced by the order of restitution requiring all of the funds in the Resident's bank account to be released to the Iowa Medicaid Fraud Control Unit. I.G. Exs. 2, 5.

Petitioner argues that her criminal offense was not in connection with the "delivery of an item or service reimbursed by the Medicare program." P. Br. at 8. In her defense, Petitioner contends that she properly notified the Medicaid Estate Recovery program of the Resident's death, but admits that she inadvertently failed to disclose the amount remaining in the Resident's checking account on the Estate Recovery form. P. Br. at 4, 6-7; P. Ex 3, at 2. According to Petitioner, she used an older form, which did not contain an area for reporting this information. P. Br. at 6. Petitioner also admits that $60.00 was taken from the Resident's bank account on or about August 30, 2010, but states that her personal bank account was linked to the Resident's account and the money was withdrawn without Petitioner's knowledge. P. Br. at 6; *see* P. Ex. 3, at 2.

I conclude that the record demonstrates that a sufficient nexus exists between Petitioner's criminal conduct and the delivery of an item or service under Medicaid. Medicaid paid for the care that the Resident received at Elmwood. *Cf.* P. Br. at 6; P. Ex. 4. A service provided by Elmwood to the Resident was that Petitioner administered the Resident's bank account. P. Br. at 6. The "delivery of an item or service under Medicare or a State health care program" includes "the performance of management or administrative

[5] According to the I.G., the amount in the Resident's bank account was $1,645.70. I.G. Br. at 3; I.G. Ex. 3.

services relating to the delivery of items or services under any such program." 42 C.F.R. § 1001.101(a); *see also Charice D. Curtis*, DAB No. 2430, at 5-6 (2011). As Petitioner admits, her control over the Resident's account was "during the course of her employment at Elmwood" and was "within the scope of her duties as bookkeeper." P. Br. at 6. Petitioner's theft offense relates to her possession of the Resident's funds as a result of her position at Elmwood. Therefore, there is a nexus between Petitioner's actions and the delivery of an item or service under the Medicaid program. *See Steven Lee Ives*, DAB CR1861, at 3 (2008) (nexus found between the burglary of nursing home residents' money by an employee of the nursing home and the delivery of an item or service under Medicare and Medicaid); *see also Frances C. Minaya*, DAB CR2736, at 5 (2013) (nexus found between the collection of fraudulent fees from nursing home residents by an employee of the nursing home and the delivery of an item or service under Medicare and/or Medicaid).

Further, the court-ordered restitution was for the full amount of the Resident's bank account that had been in Petitioner's possession and the restitution was ordered to be paid to the State of Iowa in care of the "Medicaid Fraud Control Unit." I.G. Ex. 5. This order of restitution alone can serve as sufficient evidence of a nexus between Petitioner's conviction and the Medicaid program. *Blessing Okuji*, DAB CR2343, at 5 (2011) (holding that a sentence including an order to pay restitution to the "New York State Medicaid Fraud Restitution Fund" created a rebuttable presumption of a nexus between the conviction and the delivery of an item or service under the Medicaid program); *Alexander Nepomuceno Jamias*, DAB CR1480 (2006) (holding that a sentence involving restitution to an agency that administers a program can serve as proof of a rebuttable presumption that there is a nexus between the criminal conviction and the delivery of items or services under the program administered by that agency).

To the extent that Petitioner claims that she is not guilty of any criminal conduct, I am unable to consider such an argument because it is a collateral attack on her original conviction (i.e., the *Alford* plea and participation in a deferred adjudication program). 42 C.F.R. § 1001.2007(d). Further, Petitioner has offered letters from current and former co-workers, those with whom she has a professional relationship, and friends attesting to her upstanding character. P. Ex. 12, at 3-8. However, the law mandates an exclusion for any individual who is convicted of a crime under 42 U.S.C. § 1320a-7(a)(1). *See Travers*, 20 F.3d at 998. Thus, any evidence relating to Petitioner's character and reputation is irrelevant to my analysis. Even the fact that Petitioner's conviction related to a very small amount of money is not relevant under the exclusion statute. *See Manocchio v. Kusserow*, 961 F.2d 1539, 1542 (11th Cir. 1992) (upholding a five-year exclusion based on conviction for a $62.40 fraudulent claim.)

I find that Petitioner's conviction is related to the delivery of services under the Iowa Medicaid program. I conclude that the record fully supports Petitioner's mandatory exclusion under 42 U.S.C. § 1320a-7(a)(1).

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

Five years is the minimum authorized period for a mandatory exclusion pursuant to 42 U.S.C. § 1320a-7(a)(1). 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.102(a). I have found there is a basis for Petitioner's exclusion under 42 U.S.C. § 1320a-7(a)(1). Accordingly, Petitioner must be excluded for the minimum period of five years and I do not have any discretion to reduce the length of exclusion. *See* 42 C.F.R. § 1001.2007(a)(2).

IV. Conclusion

For the foregoing reasons, I affirm 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