Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Toni Lynn Spring
(OI 5-09-40353-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-782

Decision No. CR2287

Date: November 22, 2010

DECISION

Petitioner, Toni Lynn Spring, asks review of the Inspector General's (I.G.'s) determination to exclude her for five years from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(3) 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 is a registered nurse in the State of Indiana who was arrested and charged with one felony count of possession of a legend drug, two felony counts of theft, three misdemeanor counts of conversion, and one misdemeanor count of operating a vehicle while intoxicated. I.G. Ex. 4; P. Ex. 1. On November 24, 2008, she pled guilty in an Indiana State Court to felony drug possession and to misdemeanor operating a vehicle while intoxicated. I.G. Ex. 5. The court accepted the pleas and entered judgment against her on January 12, 2009. I.G. Ex. 5; P. Ex. 2.

In a letter dated September 30, 2009,[1] the I.G. advised Petitioner that, because she had been convicted of a felony offense related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct in connection with the delivery of a healthcare item or service, 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)(3) 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 7; P. Br. at 6. The parties have submitted their principal briefs. The I.G. filed a reply brief. Petitioner filed a sur-reply, and the I.G. responded to the sur-reply. The I.G. submitted nine exhibits (I.G. Exs. 1- 9). Petitioner submitted eight exhibits (P. Exs. 1-8).

While not explicitly objecting to their admission, Petitioner argues that I.G. Exs. 7, 8, and 9 are hearsay and should not be considered. These documents are affidavits from Damon L. Grove, an investigator with the Indiana Medicaid Fraud Control Unit, and Janet L. Mason, LPN, Charge Nurse at Ben Hur Home, as well as a written statement that LPN Mason provided to the Crawfordsville, Indiana Police Department. I note first that, even under the Federal Rules of Evidence, a police report and witness affidavits would likely be admissible. (In fact, LPN Mason's declaration and statement contain virtually no hearsay). In any event, I am not bound by the Rules of Evidence. With limited exceptions (e.g. danger of unfair prejudice, confusion, undue delay), the regulations instruct me to admit evidence that is relevant and material. 42 C.F.R. § 1004.17. Because I find these documents relevant and material, I will admit them.

Nor do I sympathize with Petitioner's complaint that, since she had no criminal trial, she was unable to cross-examine these witnesses. These witnesses have now presented their testimony, under oath, in these proceedings. Petitioner could have moved to cross-examine them, if, in fact, she challenged any of the facts asserted in their statements. She has not done so.

I admit into evidence I.G. Exs. 1-9 and P. Exs. 1-8.

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)(3) 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).

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[1] The letter was returned to the I.G., because its address was incorrect. I.G. Ex. 2. The I.G. subsequently reissued the letter, and Petitioner timely filed her appeal.

III. Discussion

Petitioner must be excluded for five years, because she was convicted of a felony related to fraud and theft in the delivery of a healthcare item or service.[2]

Section 1128(a)(3) provides that an individual or entity convicted of felony fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service must be excluded from participation in federal health care programs for a minimum of five years. *See* 42 C.F.R. § 1001.101(c). 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. *Andrew Goddard*, DAB No. 2032 (2006); *Erik D. DeSimone*, DAB No. 1932 at 3-4 (2004).

Petitioner concedes that she was convicted of a felony (P. Br. at 1, 2) [3] but argues that she is not subject to exclusion, because the I.G. has not established that her crime was "related to" fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. Petitioner points out that her sole felony conviction was for drug possession, which is insufficient to justify exclusion under section 1128(a)(3). Although charged with drug theft, Petitioner argues that unsubstantiated charges are insufficient to establish the required common-sense connection between her conviction and fraud or theft in the delivery of a healthcare item or service.

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).

While I agree with Petitioner that unsubstantiated charges, by themselves, are insufficient to establish the necessary connection, here, extrinsic -- and admissible -- evidence

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

[3] In a subsequent modification order, the court reduced the felony conviction to a misdemeanor, but Petitioner concedes that she was nevertheless convicted of a felony within the meaning of section 1128(a)(3). I.G. Ex. 6; P. Br. at 1; *see* 42 C.F.R. § 1001.2 ("Conviction means that . . . [a] judgment of conviction has been entered . . . regardless of whether . . .[it] has been expunged or otherwise removed.").

establishes that Petitioner was employed by a nursing home, Ben Hur Home, and that drugs she possessed had been prescribed to residents of that facility. Specifically, in her affidavit, LPN Mason states that she identified the drugs found in Petitioner's possession, and those drugs had been prescribed to named residents of the facility. I.G. Ex. 8. I find these unrebutted facts sufficient to create a nexus between Petitioner's crime and theft of a healthcare item or service.

Petitioner also points out that state authorities have allowed her to retain her nursing license. While the state's actions may have affected the minimal length of her exclusion, it does not supersede federal law (as Petitioner acknowledges), and federal law mandates a five-year exclusion.

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