Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Grace Akpan
(O.I. No. 2-09-40563-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-228

Decision No. CR2389

Date: June 27, 2011

DECISION

Petitioner, Grace Akpan, 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)(1) of the Social Security Act (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.

Discussion

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) of the Act 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).

The parties have submitted briefs (I.G. Br.; P. Br.), and the I.G. filed a reply. With his brief, the I.G. submitted six exhibits (I.G. Exs. 1-6). In the absence of any objections, I admit into evidence I.G. Exs. 1-6.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary and, if so, to "describe the testimony it wishes to present, the names of the witnesses it would call, and a summary of each witnesses' proposed testimony." I specifically directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs and Documentary Evidence, Attachment 1 (Informal Brief of Petitioner ¶ III) and Attachment 2 (Informal Brief of I.G. ¶ III) (February 11, 2011). The I.G. indicates that an in-person hearing is not necessary. Petitioner, on the other hand, contends that an in-person hearing is necessary and lists four witnesses that she intends to call. For two of the witnesses, herself and her husband, she explains that their testimony would show that her guilty plea to criminal charges was not voluntary. She does not explain why she wants to call the other two witnesses, saying "information not available at this time." P. Br. at 3.

Thus, Petitioner offers only one justification for an in-person hearing – to challenge her criminal conviction. As the following discussion explains, her criminal conviction may not be collaterally attacked in this forum. 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000). By regulation, I must exclude irrelevant or immaterial evidence. 42 C.F.R. § 1005.17(c). I am therefore obligated to exclude the testimony that Petitioner proposes, so an in-person hearing would serve no purpose.

> ***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]

From November 2004 until March 2006, Petitioner worked for a home health agency in New York State. Although she had no valid state nursing license, she worked as a licensed practical nurse, and the agency billed the Medicaid program for her "nursing services" as if they had been provided by a licensed nurse. The deception cost the State Medicaid program $4,000 in damages. I.G. Ex. 2 at 2; I.G. Ex. 4 at 9; I.G. Ex. 5. In November 2008, she was indicted on one felony count of grand larceny and one felony count of unauthorized practice of nursing. I.G. Ex. 6. Pursuant to a plea agreement, on May 7, 2009, she pled guilty in New York State Court to one misdemeanor count of attempted criminal trespass, and the court accepted the plea. I.G. Ex. 3; I.G. Ex. 4 at 6-9; I.G. Ex. 5.

In a letter dated December 30, 2010, 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 a state health care program, the I.G. was excluding her from participation

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

in Medicare, Medicaid, and all federal health care programs for a period of five years. The letter explained that section 1128(a)(1) of the Act authorizes such exclusion. I.G. Ex. 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.

Petitioner concedes that she was convicted of a criminal offense but argues that she was not convicted of an offense for which an exclusion is required. According to Petitioner, because she was convicted of attempted criminal trespass, her crime was not related to the delivery of an item or service under Medicare or a state health care program. P. Br. at 2.

In determining whether a conviction is program-related within the meaning of section 1128(a)(1), I may look beyond both the language of the statute under which she was convicted and the precise wording of her plea. 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). 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 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, however, I need not even look at extrinsic evidence to find the necessary connection between Petitioner's crimes and the Medicaid program. In her plea agreement, Petitioner conceded that "from on or about November 23, 2004 to on or about March 7, 2006," she entered the homes of Medicaid recipients and remained there unlawfully, causing $4,000 in damages to the New York State Medicaid program. I.G. Ex. 2 at 2. She admitted in open court that her crime had cost the New York State Medicaid program $4,000 in damages and agreed to make restitution in that amount. I.G. Ex. 4 at 9.

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

She was therefore convicted of a crime related to the delivery of an item under the Medicaid program and is subject to a minimum five-year exclusion. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Petitioner also suggests that her plea was not voluntary and not adequately explained to her by her attorney. She says that she held a nursing license from Nigeria, which she thought was valid "for this position." P. Br. at 3. According to the May 7, 2009 court transcript, however, the state court judge took great pains to ensure that her plea was voluntary. After explaining the significance of her guilty plea, he gave her an additional opportunity to consult with her attorney. I.G. Ex. 4 at 4-6. Under oath, she agreed that she had ample time to discuss the plea with her attorney, was satisfied with his services, gave up her right to appeal the conviction, was pleading guilty voluntarily of her own free will, and was freely giving up her right to a trial. I.G. Ex. 4 at 7-8. After all of that, the judge gave her a final opportunity to withdraw her plea, and she repeated that she wished to plead guilty. I.G. Ex. 4 at 10.

In any event, federal regulations explicitly preclude any collateral attack on Petitioner's conviction.

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725; *Chander Kachoria, R.Ph.*, DAB No. 1380 at 8 (1993) ("There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions."); *Young Moon, M.D.*, DAB CR1572 (2007).

Conclusion

The I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs, and the statute mandates a five-year minimum period of exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge