Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jasmine Tunica-El,
(OI File No. H-14-43250-9),

Petitioner,

v.

Inspector General,
U.S. Department of Health and Human Services,

Respondent.

Docket No. C-15-2584

Decision No. CR4372

Date: October 28, 2015

DECISION

Petitioner, Jasmine Tunica-El, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)), effective May 20, 2015. Petitioner's exclusion for a minimum period of five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).[1]

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

I. Background

The Inspector General (I.G.) for the Department of Health and Human Services notified Petitioner by letter dated April 30, 2015, that she was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. The I.G. cited section 1128(a)(1) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based upon her conviction in the Superior Court of Fulton County, Georgia, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Exhibit (Ex.) 1 at 1.

Petitioner timely requested a hearing on May 22, 2015. The case was assigned to me, and I convened a prehearing conference by telephone, the substance of which is recorded in my Amended Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated July 27, 2015. The I.G. filed a motion for summary judgment with a supporting brief (I.G. Br.) and I.G. Exs. 1 through 3. Petitioner filed an opposition to the I.G.'s motion (P. Br.). The I.G. declined to file a reply brief. Petitioner did not object to my consideration of I.G. Exs. 1 through 3 and all are admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in any federal health care program any individual 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. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a).[2]

Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; or when there has been a

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[2] References are to the revision of the Code of Federal Regulations (C.F.R.) in effect at the time of the I.G. action, unless otherwise indicated.

finding of guilt in a federal, state, or local court; or when a plea of guilty or no contest has been accepted in a federal, state, or local court; or when an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. 42 U.S.C. § 1320a-7(i)(1)-(4); 42 C.F.R. § 1001.2.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that provides the basis of the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

B. Issues

The Secretary has by regulation limited my scope of review to two issues:

> Whether the I.G. has a basis for excluding an individual or entity from participating in Medicare, Medicaid, and all other federal health care programs; and
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> Whether the length of the proposed exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). If the I.G. imposes the minimum period of exclusion authorized for a mandatory exclusion under section 1128(a)(1) of the Act, then there is no issue of whether the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2). The I.G. proposes to exclude Petitioner for five years, the minimum authorized period. Therefore, the length of the proposed exclusion is not at issue.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioner timely filed her request for hearing, and I have jurisdiction.

2. Summary judgment is appropriate in this case.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to hearing before an ALJ, and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2-.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12).

Summary judgment is appropriate in an exclusion case when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *David A. Barrett*, DAB No. 1461 (1994); *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367 (1992); *Catherine L. Dodd, R.N.*, DAB No. 1345 (1992); *John W. Foderick, M.D.*, DAB No. 1125 (1990). When the undisputed material facts of a case support summary judgment, there is no need for a full evidentiary hearing, and neither party has the right to one. *Surabhan Ratanasen, M.D.*, DAB No. 1138 (1990); *Foderick*, DAB No. 1125. In opposing a properly-supported motion for summary judgment, the nonmoving party must show that there are material facts that remain in dispute, and that those facts either affect the proponent's prima facie case or might establish a defense. *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 (1997). It is insufficient for the nonmovant to rely upon mere allegations or denials to defeat the motion and proceed to hearing. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986).

There are no genuine issues of material fact in dispute in this case. Petitioner does not dispute that she was convicted of two criminal offenses within the meaning of section 1128(i) of the Act. Petitioner does not dispute that her criminal offenses were related to the delivery of a health care item or service under Medicare or a state health care

program. Her sole arguments are that she was unaware of the consequences of pleading guilty to the criminal offenses, that she was the whistleblower who alerted authorities to the underlying criminal activity, and that she fully cooperated in subsequent prosecutions. P. Br. at 1. Petitioner's arguments require application of law to the undisputed facts and, as discussed hereafter, are resolved against her. Petitioner does not identify any genuine disputes of material fact that preclude summary judgment and requests only that the period of her exclusion be reduced. P. Br. I conclude that summary judgment is appropriate as there are no genuine disputes as to any material facts and the I.G. prevails as a matter of law on the issue of whether there is a basis for exclusion based on the undisputed facts.

3. Petitioner's exclusion is required by section 1128(a)(1) of the Act.

a. Facts

The material facts of this case are undisputed. On November 22, 2011, a Fulton County, Georgia grand jury returned a true bill of indictment against Petitioner and two other individuals. The grand jury charged Petitioner with one felony count of Medicaid Fraud in violation of Georgia Code Ann. § 49-4-146.1(b) and one felony count of Conspiracy to Defraud the State, in violation of Georgia Code Ann. § 16-10-21. I.G. Ex. 2 at 1, 3, 6. Count One of the indictment alleged that Petitioner unlawfully obtained medical assistance payments in amounts to which she was not entitled, and in amounts greater than those to which she was entitled, "from the Georgia Department of Community Health (Medicaid) and from managed care programs operated, funded and reimbursed by the George Medicaid program . . . ." I.G. Ex. 2 at 3. Count Two of the indictment alleged that Petitioner unlawfully conspired and agreed with other individuals to commit the theft of money which belonged to the Georgia Medicaid program through her commission of certain enumerated overt acts. I.G. Ex. 2 at 6. On October 27, 2014, the Fulton County court accepted Petitioner's guilty pleas to two counts of the lesser included offense of Theft by Taking, in violation of Georgia Code Ann. § 16-8-2. The court sentenced Petitioner to 24 months of probation and 50 hours of community service. The court also ordered her to pay restitution in an amount to be determined later. I.G. Ex. 3 at 1, 3.

b. Analysis

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

> (a) MANDATORY EXCLUSION.—The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

> (1) Conviction of program-related crimes. — Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

Act § 1128(a)(1). The plain language of section 1128(a)(1) of the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs, any individual or entity: (1) convicted of a criminal offense; (2) where the offense is related the delivery of a health care item or service; and (3) where the delivery of the item or service was under Medicare[3] or a state health care program.

Petitioner does not dispute that she was convicted of two criminal offenses within the meaning of 1128(i) of the Act (42 U.S.C. § 1320a-7(i)). She acknowledges that she was indicted, that the prosecutor offered a "plea deal," and that she accepted the plea deal to reduced misdemeanor charges, with a sentence limitation. P. Br. at 1. The state court accepted Petitioner's guilty pleas, entered judgment, and imposed a sentence. I.G. Ex. 3 at 1. Accordingly, I conclude that Petitioner was convicted of a criminal offense within the meaning of 1128(i) of the Act.

Petitioner does not dispute that the criminal offenses of which she was convicted were related to the delivery of a health care item or service under a state health care plan within the meaning of section 1128(a)(1). The Georgia Medicaid program is a state health care program within the meaning of section 1128. 42 C.F.R. § 1001.2 (definition of state health care program); *John Y. Salinas, M.D.*, DAB CR1117 (2003). While the charges for which Petitioner was convicted do not, on their face, reflect a relationship to the delivery of an item or service under a state health care program, the indictment demonstrates the necessary connection or nexus between Petitioner's offenses and a state health care program. The offenses of which Petitioner was convicted are lesser included offenses of those of which she was charged and are based on the same criminal conduct. I.G. Ex. 2 at 1; I.G. Ex. 3 at 1. Here, there is no question that the allegations of the indictment are the same facts upon which her conviction is based. *See Tanya A. Chuoke, R.N.*, DAB No. 1721. The indictment charged Petitioner with one felony count of Medicaid fraud and one felony count of conspiracy to defraud the state. I.G. Ex. 2 at 3, 6. The felony count for conspiracy to defraud the state arose from a conspiracy to defraud the Georgia Medicaid program, a state agency. I.G. Ex. 2 at 6. Specifically, Petitioner was indicted for unlawfully obtaining medical assistance payments in amounts to which

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[3] The statute refers to "Title XVIII," meaning Title XVIII of the Act, which authorizes the program known as Medicare.

she was not entitled and in amounts greater that those to which she was entitled from the Georgia Medicaid program. I.G. Ex. 2 at 3. She was likewise indicted for her participation in a conspiracy to unlawfully steal money that belonged to the Georgia Medicaid program. I.G. Ex. 2 at 6. The filing of fraudulent Medicaid claims is sufficient to support an exclusion under section 1128(a)(1). *Suzanne Pindell*, DAB CR 3329 (2014). Likewise, engaging in conspiracy to steal money from a state Medicaid program plainly relates to the delivery of an item or service under a state health care program. The indictment shows that Petitioner's lesser included charges derived from both of the felony counts on which she was indicted. I.G. Ex. 3 at 1. I conclude that there is the necessary nexus or commonsense connection between the offenses of which Petitioner was convicted and the delivery of a health care item or service under a state health care program. *Berton Siegel, D.O.*, DAB No. 1467 (1994).

Petitioner argues that she was unaware when she agreed to a plea deal that the I.G. would subsequently exclude her. Petitioner's lack of awareness of the subsequent consequences of her plea agreement is not a basis upon which to disturb the I.G.'s imposition of an exclusion. *Douglas Schram, R.Ph.*, DAB CR215 (1992), *aff'd* DAB No. 1372 (1992).

Accordingly, I conclude that Petitioner was convicted of criminal offense related to the delivery of a health care item or service under a state health care program. All elements of section 1128(a)(1) of the Act are met. There is a basis for Petitioner's exclusion. The I.G. has no discretion under the Act not to exclude Petitioner when the elements of section 1128(a)(1) are satisfied as they are in this case.

4. Five years is the minimum authorized period of exclusion pursuant to section 1128(a) of the Act.

5. Petitioner's exclusion for five years is not unreasonable as a matter of law.

Petitioner argues for a reduction of the length of exclusion on several bases. Petitioner argues that she was the whistleblower whose testimony led to the prosecution of other individuals against whom she testified and that the state court did not order her to pay restitution. P. Br. at 1. Petitioner's arguments must be resolved against her as a matter of law.

Congress established five years as the minimum period of exclusion for exclusions pursuant to section 1128(a) of the Act. Act § 1128(c)(3)(B). Pursuant to 42 C.F.R. § 1001.2007(a)(2), when the I.G imposes an exclusion pursuant to section 1128(a) of the Act for the statutory minimum period of five years, there is no issue of whether or not the period is unreasonable. Accordingly, I conclude that Petitioner's exclusion for a period of five years is not unreasonable as a matter of law.

Petitioner argued that she has already suffered as a result of her conviction and that she simply wishes to provide for her family and move on with her life. P. Br. at 1. However, I have no authority to reduce the period of exclusion below the mandatory minimum of five years based on the negative repercussions Petitioner has already suffered as a result of her acts. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

Exclusion is effective 20 days from the date of the I.G.'s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b).

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for the minimum statutory period of five years, effective May 20, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge