Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Roger Lea Scherer
(OI File No.: H-15-42280-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-85

Decision No. CR4512

Date: January 21, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Roger Lea Scherer, from participation in Medicare, Medicaid, and all other Federal health care programs pursuant to section 1128(a)(2) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(2)) for a period of five years. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner, and an exclusion for the minimum period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background

In a letter dated September 30, 2015, the IG excluded Petitioner from participation in Medicare, Medicaid, and all Federal health care programs as defined in section 1128B(f) of the Act, 42 U.S.C. § 1320a-7b(f), for a minimum period of 5 years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1. The IG explained that Petitioner's exclusion was based on a "conviction as defined in section 1128(i)(42 U.S.C. [§] 1320a-7(i)), in the Circuit Court for the Ninth Judicial Circuit in and for Orange County, Florida, of a criminal offense related to neglect or abuse of patients in connection with

the delivery of a health care item or service . . . ." IG Ex. 1 at 1. The IG explained Petitioner was excluded pursuant to section 1128(a)(2) of the Act, which mandates the exclusion of any individual who is convicted under Federal or state law of a criminal offense related to the neglect or abuse of patients while in connection with the delivery of a health care item or service. The IG informed Petitioner that the exclusion was for the "minimum statutory period of five years." IG Ex. 1 at 1; *see* 42 U.S.C. § 1320a-7(c)(3)(B).

Petitioner, who is currently not represented by counsel, submitted a timely request for hearing that was dated and received on November 4, 2015. On November 20, 2015, pursuant to 42 C.F.R. § 1005.6, I presided over a telephonic pre-hearing conference, and on that same date, I issued an Order and Schedule for Filing Briefs and Documentary Evidence (Order).

Pursuant to my Order, the IG filed an informal brief and a reply brief, along with five exhibits (IG Exs.) 1-5. Petitioner filed an informal brief (P. Br.) and did not file any marked exhibits. I admit the parties' submissions and exhibits into the record. Neither party requested that I convene a hearing in person, and I am therefore deciding this case based on the parties' written filings.

II. Issues

The issue in this case is whether there is a legal basis under section 1128(a)(2) of the Act for the IG to exclude Petitioner from participation in Medicare, Medicaid, and other Federal health care programs. If I find a legitimate basis for the exclusion, I am required to uphold the mandatory five-year exclusion.

III. Jurisdiction

I have jurisdiction to adjudicate this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. § 1005.2.

IV. Findings of Fact, Conclusions of Law, and Analysis[1]

1. Petitioner was convicted of committing battery on a patient, which is an offense, as defined in section 1128(i) of the Social Security Act, that subjects him to a mandatory exclusion from all federal health care programs for a minimum of five years.

Section 1128(a)(2) requires a mandatory exclusion from all federal health care programs under certain conditions. Section 1128(2) states:

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

> (a) Mandatory exclusion
>
> The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a-7b(f) of this title):
>
> ****
>
> (2) Conviction relating to patient abuse
>
> Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

The IG argues that Petitioner was properly excluded from all Federal health care programs based on a conviction for an offense related to patient abuse. IG Br. at 2-3. While Petitioner, in his informal brief, does not deny the underlying conduct to which he pleaded guilty, he denies that he was actually convicted of a criminal offense. As explained below, I find that Petitioner was convicted of a criminal offense, for purposes of the Act, that mandates exclusion from all Federal healthcare programs.

On June 25, 2015, the State of Florida charged Petitioner with committing battery, as stated in the information that was filed in court that same day:

> ROGER LEA SCHERER, on or about the 19th day of December, 2014, in said County and State, did knowingly or willfully, in violation of Florida Statute 784.03(1)(a), actually a[n]d intentionally touch or strike another person, to witt [E.R.], against her will, or intentionally cause bodily harm to another person, to witt [E.R.].[23]

---

[2] Petitioner was initially charged with committing the third degree felony offense of Abuse of a Disabled Adult, Fla. Stat. § 825.102(1)(b), docketed under complaint number 48-2015-CF-008403-O. IG Exs. 2, 4. In conjunction with Petitioner's guilty plea, the charge was amended to the offense of misdemeanor battery. IG Ex. 4.

[3] Petitioner asserts that the IG improperly disclosed the victim's name in an exhibit it submitted with its pre-hearing exchange and alleges, "I would have thought the federal government would have protected her better." Petitioner is mistaken, as the DAB requires electronic filing of documents and does not impose any redaction requirement because cases can only be accessed by the parties and their representatives. *See* Civil Remedies Division Procedures, Rule 6(a)(viii)(2) (noting that "[a]ccess to cases on the

On June 25, 2015, Petitioner pleaded guilty in the County Court of Orange County, Florida, to the misdemeanor offense of battery.

The aforementioned Florida statute, § 784.03, indicates that the offense of battery occurs when a person "[a]ctually and intentionally strikes another person against the will of the other" or "[i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03. By pleading guilty, Petitioner admitted that he committed a battery against E.R. on or about December 19, 2014. A probable cause affidavit, dated June 22, 2015, reports that E.R. was a 68 year old female hospital patient who was reported to have dementia. IG Ex. 2 at 3-4. E.R. wore special mittens on her hands "as a precaution to keep the patient from scratching themselves or others." IG Ex. 2 at 4. Petitioner was assigned the task of changing E.R.'s diaper and clothing on December 19, 2014, and when he attempted this task, E.R. "started to flail her arms" and struck Petitioner. In response, and according to P.L., a nurse-in-training who observed the incident and reported it to her clinical instructor, Petitioner "punched [E.R.] on the left side of her chest with a closed fist." IG Ex. 2 at 4. When interviewed by a law enforcement investigator employed by the Florida Office of the Attorney General, Petitioner did "not recall striking the patient, but he heard the patient scream so therefore he assumed something had happened." IG Ex. 2 at 5. In his November 4, 2015 request for hearing, Petitioner was somewhat more forthcoming in acknowledging that he struck the victim, stating "[t]his event traumatized me so much because this behavior is not who I am, nor what I desire or plan. It opposes everything I stand for." Petitioner further stated in his brief that he "voluntarily relinquished [his] license because this isolated event traumatized me so much and feel I have paid my debt to society." P. Br. at 3.

I find that Petitioner has a conviction for a criminal offense. Petitioner denies he was convicted of a criminal offense because the judge withheld the adjudication of guilt at the time he accepted Petitioner's guilty plea. However, pursuant to section 1128(i)(3) of the Act, he is considered to have been convicted of a criminal offense "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court." 42 U.S.C. § 1320a-7(i)(3). Section 1128(i)(4) of the Act states that an individual has been convicted of a criminal offense "when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." 42 U.S.C. § 1320a-7(i)(4). On June 25, 2015, Petitioner entered a plea of guilty to the charge of battery, at which

---

DAB E-File system is limited to the parties and their authorized representatives) and Rule 6(a)(viii)(3) (directing that exhibits be electronically uploaded to the E-File system). While Civil Remedies Division administrative law judge decisions are posted on the DAB's website, documents uploaded by the parties to individual case dockets are not viewable by the general public. In order to protect the victim's privacy, I will refer to the victim by only her initials, E.R., in this decision.

time the county judge indicated that the court "withholds adjudication of guilt." IG Ex. 5 at 1; *see* IG Ex. 4. Petitioner was sentenced to two days of incarceration, with credit given for two days of time already served.[4] He was ordered to serve one year of supervised probation, with supervision performed via telephone or mail, and ordered to pay a fine and costs totaling $273.00. IG Ex. 5 at 1. The IG correctly determined that the guilty plea to the offense of battery is properly considered to be a conviction for purposes of the Act. In fact, Florida law specifically defines a "conviction" as including a "determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld." Fla. Stat. § 921.0021(2). *See Lorrie Laurel, PT,* DAB No. 2524 at 5 (2013) (discussing that the Florida Supreme Court concluded that Fla. Stat. § 921.0021(2) "'clearly indicates that the Legislature wanted to include all determinations of guilt [in the definition of conviction] even where adjudication had been withheld.' *Montgomery v. State* 897 So.2d 1282, 1287 (2005)."); *see also Travers v. Shalala,* 20 F.3d 993, 997 (9th Cir. 1994) (stating "[t]o determine whether state court proceedings constituted a conviction under § 1320a-7(i), we look to the substance of the proceedings, rather than any formal labels or characterizations used by the state or by the parties" and that when judgment has been withheld, "the entry of judgment is a mere formality because the defendant has irrevocably committed himself to a plea of guilty or no contest which cannot be unilaterally withdrawn.").

In addition to finding that Petitioner was convicted of committing the offense of battery, I further find that the battery constituted abuse of an individual in connection with the delivery of a health care item or service. *See* 42 U.S.C. § 1320a-7(a)(2). The victim of the battery, E.R., was a hospital patient. Petitioner was the certified nurse assistant who was attending to the victim at the time he committed the battery. IG Exs. 2 at 1-2; 3 at 1-3. Petitioner's conviction for abuse of this patient falls squarely within the parameters outlined in section 1128(a)(2) of the Act.

Petitioner argues that the IG was unreasonable in his determination that an exclusion for a minimum period of five years is mandated. Pursuant to section 1128(a) of the Act, the *minimum* period of exclusion for such a conviction for a criminal offense is five years. 42 U.S.C. § 1320a-7(c)(3)(B). I agree with the IG that Petitioner's criminal conviction mandates exclusion. Petitioner argues that he has "paid [his] debt to society" and that "[j]ustice without mercy is not justice." P. Br. at 3. Petitioner has already been afforded considerable mercy by the criminal justice system, in that he served two days in prison for a crime that could have potentially resulted in a sentence of up to one year in prison. *See* Fla. Stat. § 775.082(4)(a). Petitioner pleaded guilty to striking an infirm woman with a closed fist when he was supposed to be acting as her caregiver. While Petitioner believes he paid his debt to society, his crime was not against society. Rather,

[4] According to Fla. Stat. § 784.03, "a person who commits battery commits a misdemeanor of the first degree." A first degree misdemeanor is punishable by "a definite term of imprisonment not exceeding 1 year." Fla. Stat. § 775.082(4)(a).

Petitioner's crime affected a person, and the victim in this case was a vulnerable hospital patient. Congress, through enactment of the Social Security Act, has determined that an individual who has been convicted of an offense relating to the abuse of a patient in connection with the delivery of a health care item or service *must* be excluded from federal health care programs for no less than five years, and it has afforded neither the IG nor an administrative law judge the discretion to impose an exclusion of a shorter duration. 42 U.S.C. § 1320a-7(c)(3)(B). Congress, in setting forth a mandatory minimum exclusion of five years in duration, has not contemplated that any "mercy" is warranted in a situation where a health care provider was criminally convicted of committing an act of violence on a patient.[5] Even if I were so inclined, I cannot shorten the length of the exclusion because I do not have authority to "find invalid or refuse to follow Federal statutes or regulations." 42 C.F.R. § 1005.4(c)(1).

V. Effective Date of Exclusion

The effective date of the exclusion, October 20, 2015, is established by regulation, and I am bound by that provision. 42 C.F.R. §§ 1001.2002(b); 1005.4(c)(1).

VI. Conclusion

For the foregoing reasons, I affirm the IG's decision to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years.

/s/
Leslie C. Rogall
Administrative Law Judge

[5] The Departmental Appeals Board has discussed the congressional intent underlying the IG exclusion statutes, explaining that "the rationale for the different treatment of the term `conviction' under the federal exclusion law and state criminal law is based on differences in their goals. The federal exclusion law aims to protect beneficiaries of health care programs and the federal fisc through remedial actions such as exclusions, whereas criminal law generally involves punishment, rehabilitation, and the deterrence of future misconduct." *Henry L. Gupton*, DAB No. 2058 at 7 (2007).