Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sharon Guei a/k/a Sharon Wells
(OI File No. H-15-42530-9),

Petitioner,

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-16-68

Decision No. CR4571

Date: April 6, 2016

DECISION

Petitioner, Sharon Guei, 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 October 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 United States Department of Health and Human Services notified Petitioner by letter dated September 30, 2015,[2] that she was being 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 Court of Common Pleas in Franklin County, Ohio, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Ct. Ex. 1.[3]

Petitioner timely requested a hearing on October 6, 2015 (RFH). On November 6, 2015, the case was assigned to me to hear and decide. A prehearing conference was convened by telephone on November 30, 2015, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued November 30, 2015. Petitioner mailed several documents that were received at my office on January 8, 2016. DAB E-File Item #5. The documents were not marked as exhibits and, on January 12, 2016, I issued an order rejecting Petitioner's documents because they did not comply with Civil Remedies Division

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[2] The I.G. notice of exclusion was uploaded to the Departmental Appeals Board Electronic Filing System (DAB E-File) under Item #1, described as "Originating Case Decision." I treat this document as if marked Court Exhibit (Ct. Ex.) 1. There are two dates stamped on Ct. Ex. 1. One stamp is September 30, 2015, and the other is October 13, 2015. The parties agreed during a prehearing conference that the I.G.'s exclusion notice letter was dated September 30, 2015. Furthermore, Petitioner mailed her request for hearing on October 6, 2015. Therefore, I infer that the October 13, 2015, stamp is the date that Ct. Ex. 1 was received by my administrative staff in the mail.

[3] Neither party offered the I.G.' exclusion notice dated September 30, 2015 as evidence. Petitioner submitted a copy of the letter with her request for hearing and all references are to that copy, which is treated as if marked Ct. Ex. 1. The parties do not dispute the authenticity of the notice letter dated September 30, 2015, which Petitioner filed with her request for hearing. No issue has been raised as to the adequacy of the notice or that notice was received by Petitioner. Ct. Ex. 1 is admitted as evidence. Generally, the I.G. has the burden to prove that it complied with notice requirements of the regulations at 42 C.F.R. §§ 1001.2001-.2003, 1005.2(c), 1005.15(b)(2) and therefore the I.G. should generally offer the notice as evidence. Because there is no dispute as to the adequacy of the notice or that it was actually served, the I.G. suffers no consequence as the result of this oversight.

Procedures (CRDP) § 14. I notified Petitioner that she could properly label and resubmit the documents for consideration no later than March 1, 2016, the date her prehearing exchange was due.

On January 14, 2016, the I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) with four exhibits marked as I.G. Exs. 1 through 4. On February 9, 2016, Petitioner filed a response letter which she marked "S.G. Ex. 1" with five additional exhibits marked "S.G. Ex. 2," "S.G. Ex. 3," "S.G. Ex. 4," and "S.G. Ex. 5." Petitioner filed two documents marked "S.G. Ex. 5"; one is a two-page court document titled "Sentencing Entry," and the other document is one page of a letter from Petitioner's attorney in an overtime rights lawsuit against Petitioner's former employer. I treat the letter from Petitioner's attorney as being marked P. Ex. 6. In this decision, I refer to Petitioner's submissions as follows: S.G. Ex. 1 is referred to as P. Br., S.G. exhibits 2 through 5 are referred to as P. Exs. 2 through 5, respectively. The I.G. filed a notice on March 16, 2016, that he elected not to file a reply brief.

Petitioner has not objected to my consideration of I.G. Exs. 1 through 4 and they are admitted as evidence. The I.G. did not object to my consideration of Petitioner's proposed exhibits. Nevertheless, the regulations require that I exclude "irrelevant or immaterial evidence." 42 C.F.R. § 1005.17(c).[4] Petitioner's written argument (marked S.G. Ex. 1) is not admitted as evidence. P. Ex. 2 is a January 2, 2013 determination by the Ohio Office of Unemployment Compensation allowing Petitioner's claim for unemployment compensation beginning December 9, 2012. P. Ex. 2 is not relevant to the issue before me, which is whether she was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. 42 C.F.R. § 1001.2007(a)(1)-(2). The unemployment benefits determination may tend to show that Petitioner's criminal conduct lasted through June 2013, but that issue is not properly before me in this case. 42 C.F.R. § 1001.2007(a)(2), (d). Therefore, P. Ex. 2 is not admitted. P. Ex. 3 consists of seven separate W-2 tax documents for Petitioner from her prior employer, Maxim Healthcare Services. The documents in P. Ex. 3 are minimally relevant to show Petitioner was employed at Maxim Healthcare Services between 2005 and 2012, where she engaged in the unlawful activity that led to her conviction. Accordingly, P. Ex. 3 is admitted. P. Ex. 4 is an undated excerpt from a listing of sanctions imposed by the Nevada State Health Division's Bureau of Licensure and Certification. Petitioner's, maiden name, is listed under the sanction of "Findings of guilt for Abuse, Neglect, or Misappropriation placed on the Certified Nursing Assistant Registry." The administrative sanction in Nevada is not cited by the I.G. as a basis for

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[4] Citations are to the 2014 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

exclusion or an aggravating factor in this case. Therefore, P. Ex. 4 is not relevant to the issue before me and it is not admitted. P. Ex. 5 contains two pages of a court document that is duplicative of I.G. Ex. 1 at 2-3, except for the markings added by the parties. The document need not be admitted as evidence twice and P. Ex. 5 is not admitted. P. Ex. 6 is not relevant and not admitted because Petitioner's involvement in a labor dispute against her former employer has no tendency to make the existence of a basis for Petitioner's exclusion more or less likely. Fed. R. Evid. 401.

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 this provision of the Act. 42 C.F.R. § 1001.101(a).

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

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). Here, the I.G. has proposed to exclude Petitioner for the minimum authorized exclusion period, so the length of the proposed exclusion is not at issue. *Id.*; Ct. Ex. 1.

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.

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, and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or the moving party prevails as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628, at 3 (1997) (holding in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Ctr.*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. Petitioner does not deny that: she entered into a plea agreement with the advice and assistance of counsel; the trial court accepted her guilty plea and found her guilty of theft by deception; and the court ordered Petitioner to pay $1,221.50 in restitution to the Ohio Department of Medicaid. RFH; P. Br. at 2; I.G. Exs. 1-2. Petitioner argues that her prior employer reported her to the Medicaid fraud unit as retaliation for her joining a lawsuit against the employer seeking unpaid overtime wages. P. Br. at 1. She also claims that she pled guilty only to avoid being in jail while she awaited trial. P. Br. at 2. But the issues that Petitioner raises are not material facts, do not negate her conviction, and are collateral attacks on her conviction that are not subject to review in this proceeding. 42 C.F.R. § 1001.2007(d). This case can be decided by applying the applicable law to the undisputed facts and summary judgment is appropriate.

3. Section 1128(a)(1) of the Act requires Petitioner's exclusion from participation in Medicare, Medicaid, and all other federal health care programs.

a. Facts

The material facts of this case are undisputed. On September 16, 2014, an indictment was filed against Petitioner, charging her with one count of theft by deception from August 5, 2006 to June 24, 2013, of more than $7,500 but less than $150,000, with the purpose of depriving the Ohio Department of Medicaid of money. I.G. Ex. 3 at 1. The charged offense is a fourth-degree felony in Ohio. Ohio Rev. Code § 2913.02(A)(3). On April 13, 2015, Petitioner entered a guilty plea to "the lesser included offense of Theft by Deception, in violation of [Ohio Revised Code] 2913.02(A)(3), a misdemeanor of the first degree." I.G. Ex. 2. The trial court accepted the guilty plea and found Petitioner guilty of the agreed lesser included offense. I.G. Ex 1 at 1. On April 15, 2015, the court sentenced Petitioner to 180 days in jail, but suspended execution of that sentence. The court also sentenced Petitioner to one year of probation and to pay restitution of $1,221.50 to the Ohio Department of Medicaid. I.G. Ex. 1 at 1-2.

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). Thus, 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 to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or any state health care program. The definition of a "[s]tate health care program" includes state Medicaid plans. Act § 1128(h) (42 U.S.C. § 1320a-7(h)).

For an exclusion pursuant to section 1128(a), an individual or entity is considered to have been "convicted" of an offense if, among other things, "a plea of guilty or nolo contendre by the individual or entity has been accepted by a Federal, State, or local court." Act § 1128(i)(3) (42 U.S.C. § 1320a-7(i)(3)). Here, the trial court accepted Petitioner's guilty plea to a misdemeanor offense of theft by deception from the Ohio Medicaid program. I.G. Ex. 1 at 1; I.G. Ex. 2. The court's acceptance of Petitioner's guilty plea establishes that Petitioner was "convicted" of that offense for purposes of her exclusion under section 1128(a)(1) of the Act. Act § 1128(i)(2), (4).

Petitioner now argues that she pled guilty because she would have been confined to jail while she awaited trial had she not agreed to plead guilty. P. Br. at 2. I have no reason to doubt Petitioner's claim, but the reasons that motivated her to plead guilty cannot be considered in this proceeding. Petitioner's assertions about why she pled guilty and the corollary argument of whether she was actually guilty of the offense to which she pled guilty amount to collateral attacks that are prohibited by regulation. 42 C.F.R. § 1001.2007(d).

Petitioner does not dispute that her conviction for theft by deception from the Ohio Medicaid program was related to the delivery of a health care item or service under the Medicare or Medicaid programs. There can be no doubt that it was. Petitioner was charged with the theft of money from the Ohio Department of Medicaid. I.G. Ex. 3. Petitioner pled guilty to that offense, albeit as a misdemeanor rather than as a felony, as originally charged. I.G. Ex. 2. By pleading guilty to the lesser included offense of that charged, Petitioner admitted that she unlawfully obtained money from the Ohio Medicaid program. In addition, Petitioner was ordered to pay restitution to the Ohio Department of Medicaid. I.G. Ex. 1 at 2. The only reasonable conclusion that one may draw from the order directing Petitioner to make restitution to the Ohio Medicaid program is that the offense to which Petitioner pled guilty resulted in a loss to the Ohio Medicaid program. A crime resulting in financial loss to a Medicaid program is necessarily related to the delivery of items or services under that Medicaid program because it diverts money from

necessary health care services and functions of the program. *Burton Siegel, D.O.*, DAB No. 1467 at 6-7 (1994) (concluding that a petitioner's facilitation of theft conviction involving misappropriation of Medicaid funds was related to the delivery of a health care item or service under a state health care program). Accordingly, I conclude that all three elements of section 1128(a)(1) of the Act have been met and there is a basis for Petitioner's exclusion.

4. Section 1128(c)(3)(B) of the Act requires a minimum exclusion period of five years for any exclusion action pursuant to section 1128(a) of the Act.

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

Congress established five years as the minimum period of exclusion for exclusions required pursuant to section 1128(a). 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 argues that exclusion for five years is unfair because she has already been punished. However, the I.G., the Secretary and I have no discretion to reduce the period of exclusion below that mandated by Congress in section 1128(c)(3)(B) of the Act.

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 October 20, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge