

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Lisa V. Joseph
(OI: 2-09-40528-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-758

Decision No. CR2253

Date: September 28, 2010

DECISION

Petitioner, Lisa V. Joseph, 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. 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 worked as a private-duty nurse who was paid by the New York State Medicaid program to care for program beneficiaries in their homes. She billed the Medicaid program for hours that she did not work. P. Br. at 2; I.G. Ex. 6. She was indicted on seventeen felony counts and, on June 8, 2009, pled guilty in New York State Court to one felony count of grand larceny. I.G. Exs. 2, 5. The court accepted the plea, sentenced her to five years probation, and ordered her to pay \$83,303 in restitution to the New York Medicaid Program. I.G. Ex. 4, 6.

In a letter dated April 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 state health care program, 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)(1) 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 3; P. Br. at 2. The parties have submitted briefs, and Petitioner included additional arguments in her cover letter (P. Letter). The I.G. submitted eight exhibits (I.G. Exs. 1-8). Petitioner attached two documents to her brief, which we have marked P. Exs. 1 and 2. The I.G. filed a reply brief.

In the absence of any objections, I admit into evidence I.G. Exs. 1-8 and P. Exs. 1-2.

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)(1) 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).

III. Discussion

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

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. Since Petitioner was convicted of defrauding the Medicaid program, she is subject to exclusion.

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

² The term “state health care program” included a state’s Medicaid program. Section 1128(h)(1) of the Act; 42 C.F.R. § 1320a-7(h)(1).

Petitioner concedes that she was convicted of a criminal offense, but, quoting language from the I.G.'s notice letter, she argues that the exclusion statute does not apply to her because she provides direct patient care. P. Letter; P. Ex. 1. Petitioner misconstrues the notice, which provides:

This exclusion significantly limits your ability to work in any capacity in the health care field in the United States. No payment will be made by any Federal health care program . . . for any items or services furnished, ordered, or prescribed by you in any capacity. For example, you are prohibited from submitting or causing claims to be submitted to Federal health care programs for items or services which you provide, and you are also prohibited from being employed to provide items or services which are billed to a Federal health care program. Such items or services could include administrative, clerical, and other activities that do not directly involve patient care or the provision of any health care related services.

P. Ex. 1; I.G. Ex. 8. Petitioner quotes only the final sentence of that paragraph. But, read in context, the notice plainly warns Petitioner that no federal or state health care program will pay for *any* item or service she furnishes, which would obviously include direct patient care services. The final sentence of the paragraph underscores the breadth of the exclusion, by listing some of the less obvious activities that will not be reimbursed.

Petitioner also argues that she did not steal from Medicaid and did not intend to defraud. P. Br. at 2. However, federal regulations explicitly preclude such collateral attacks on a 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 (2000); *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 CR 1572 (2007).

