Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Alexandra Shereshevskaya, M.D.
(O.I. File Number 2-10-40628-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-657

Decision No. CR2484

Date: January 9, 2012

DECISION

Petitioner, Alexandra Shereshevskaya, M.D., 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 June 20, 2011, based upon her conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period[1] 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

The Inspector General (I.G.) for the Department of Health and Human Services (HHS) notified Petitioner by letter dated May 31, 2011, that she was being excluded from

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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.

participation in Medicare, Medicaid, and all federal health care programs for a period of five years. The I.G. advised Petitioner that she was being excluded pursuant to section 1128(a)(1) of the Act, based on her conviction in the Kings County Supreme Court of the State of New York of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner requested a hearing by letter dated August 3, 2011. The case was assigned to me for hearing and decision. A prehearing telephone conference was convened on September 14, 2011, the substance of which is memorialized in my order of September 15, 2011. During the prehearing conference, Petitioner declined to waive an oral hearing, and the I.G. requested to file a motion for summary judgment. I set a briefing schedule.

The I.G. filed a motion for summary judgment and a supporting brief (I.G. Br.) on October 14, 2011, with I.G. exhibits (I.G. Exs.) 1 through 6. Petitioner filed a brief in opposition to the I.G.'s motion (P. Br.) on November 15, 2011. Petitioner did not file any exhibits. The I.G. filed a reply brief (I.G. Reply) on November 29, 2011. Petitioner did not object to my consideration of I.G. Exs. 1 through 6 and they are admitted.[2]

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner with rights to an administrative law judge (ALJ) hearing and judicial review of the final action of the HHS Secretary (Secretary). Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld.

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[2] Petitioner argues that I.G. Exs. 2 and 3 cannot "lawfully support the imposition of any sanction." However, Petitioner did not object to the admission of I.G. Exs. 2 and 3, but rather, cites the exhibits in support of her argument. P. Br. at 2. I find the exhibits to be of minimal relevance and there is no issue as to their authenticity, so they are admitted.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. 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 I.G. does not cite any aggravating factors in this case and does not propose to exclude Petitioner for more than the minimum period of five years.

Petitioner bears the burden of going forward with the evidence and the burden of persuasion on any affirmative defenses or mitigating factors. The I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b), (c). The burden of persuasion is judged by a preponderance of the evidence. 42 C.F.R. §§ 1001.2007(c), 1005.15(d). Petitioner may not obtain review of, or collaterally attack on procedural or substantive grounds, a criminal conviction or civil judgment of a federal, state, or local court or another government agency that is cited in this forum as the basis for exclusion. 42 C.F.R. § 1001.2007(d).

B. Issue

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

> Whether there is a basis for the imposition of the exclusion; and
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> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(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's request for hearing is timely, 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, a person subject to exclusion has a right to reasonable notice and an opportunity for hearing. The right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 42

C.F.R. § 1005.3. 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 that, if true, would refute the facts that the moving party relied upon. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (finding 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 Life Plus Ctr.*, DAB CR700 (2000); *New Millennium CMHC, Inc.*, DAB CR672 (2000).

There is no dispute that Petitioner was convicted of a criminal offense. P. Br. at 1-3. The undisputed facts related to Petitioner's guilty plea leave only a question of law as to whether the undisputed facts show the requisite nexus between the offense of which Petitioner was convicted and the delivery of an item or service under the New York Medicaid program. Petitioner has averred no material facts that are in dispute as to whether or not the nexus exists. P. Br. at 3-7. Petitioner's arguments that: she was convicted of an attempt to falsify business records; she was convicted of a misdemeanor rather than a felony; there was no actual impact upon a health care program; no records were actually falsified; the underlying conduct related to billing for thirty minutes rather than fifteen minutes; the evidence does not show intent to misrepresent or defraud; the sentence included no order for restitution; the New York Attorney General and the Judge may have intended for her punishment to be limited to her plea agreement; and no action has been taken against Petitioner's license, do not show material facts in dispute as to whether or not the conduct for which Petitioner was convicted related to the delivery of an item or service under Medicare or Medicaid. Rather, as discussed below, the issue must be resolved against Petitioner as a matter of law based on the undisputed facts and summary judgment is appropriate.

3. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

It is not disputed that on December 10, 2009, Petitioner was convicted pursuant to her guilty plea in the Kings County Supreme Court of the State of New York, of one misdemeanor count of attempting to falsify business records in the second degree. I.G. Ex. 4; P. Br. The transcript of the criminal proceedings shows that Petitioner admitted to the court that on about September 21, 2004, she attempted to make or cause to be made, a false entry in the business records of Federation Employment and Guidance Services Incorporated, causing $800 in damages to the New York State Medicaid Program. I.G.

Ex. 4, at 8. Petitioner was given an unconditional discharge, based on her representation to the court that she had already made $800 in restitution to the Attorney General's Medicaid Restitution Fund. I.G. Ex. 4, at 3, 6, 8. Petitioner admits that the conduct that was the basis of her criminal offense involved her billing for thirty minutes when she should have billed for fifteen minutes. P. Br. at 4.

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.

The statute requires that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a criminal offense, whether a felony or a misdemeanor; (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 a state health care program.

Petitioner does not dispute that she was convicted of a criminal offense within the meaning of section 1128(i) of the Act, when her guilty plea was accepted by the Kings County Court. I.G. Ex. 4. Petitioner argues that: she was convicted of a misdemeanor not a felony; the conviction was only for attempting to falsify business records and not actually falsifying records; and that the evidence does not show any intent to misrepresent or defraud anyone. P. Br. at 2-7. Petitioner does not cite any authority in support of her arguments that imply that section 1128(a)(1) of the Act does not mandate exclusion for misdemeanor convictions of attempt crimes. Indeed, there are no decisions to that effect to cite. Rather, the plain language of section 1128(a)(1) of the Act is that it applies to conviction of any offense, misdemeanor or felony, inchoate crime or not, intentional or not, that meets the other elements of the statute. Petitioner admits in her brief that the conduct underlying her conviction related to billing for her services as a physician. P. Br. at 4. Petitioner argues, however, that her conviction did not relate to the delivery of her services under Medicare or Medicaid. P. Br. at 6-7. Petitioner's argument is without merit as Petitioner admitted to the criminal court that her attempted misconduct caused $800 in damages to the New York Medicaid program. Petitioner may not now challenge or deny her admission before me because the basis for her underlying

conviction is not subject to collateral attack on procedural or substantive grounds before me. 42 C.F.R. § 1001.2007(d). Petitioner asserts that her admission that her conduct caused $800 in damages to the New York Medicaid program does not establish that her offense was related to the delivery of an item or service under that program. Petitioner cites no authority in support of her assertion and does not explain how she arrives at that conclusion. I conclude that her admission during her criminal proceedings that she caused $800 damage to the New York Medicaid program is sufficient to establish the nexus, or common sense connection, between her offense and the delivery of her services under that program. *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Berton Siegel, D.O.*, DAB No. 1467 (1994).

Accordingly, I conclude that the elements of section 1128(a)(1) of the Act are satisfied in this case and Petitioner's exclusion is mandated. The I.G. and I are granted no discretion to do otherwise. *Craig Richard Wilder*, DAB No. 2416, at 6-7 (2011); *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Niranjana B. Parikh, M.D.*, DAB No. 1334 (1992).

4. Pursuant to section 1128(c)(3)(B) of the Act, five years is the minimum period of exclusion pursuant to section 1128(a)(1) of the Act.

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

Five years is the minimum authorized period for a mandatory exclusion pursuant to section 1128(a). Act § 1128(c)(3)(B). I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act, the minimum period of exclusion is five years, and that period is not unreasonable as a matter of law. I have no authority to reduce the period of exclusion based upon any of the factors urged by Petitioner.

6. Petitioner was not denied due process.

Petitioner argues that sections 1128(c) and 1128(f)(1) of the Act (42 U.S.C. §§ 1320a-7(c) and (f)(1)) require "reasonable notice and an opportunity for a timely hearing." Petitioner argues that the delay of approximately 18 months between the time of her sentencing on December 10, 2009 and June 20, 2011, the effective date of her exclusion, is unreasonable, prejudicial, and arbitrary, and caused adverse impact and great harm to Petitioner. P. Br. at 7-8. Petitioner's arguments are unavailing. My review is limited in these cases and I have no authority to review the timeliness of the I.G.'s imposition of exclusion or its effective date.

I do have authority to determine that there was no deprivation of due process in this case. Petitioner was provided notice as required by the Act and regulations and Petitioner was given the opportunity to request a hearing to contest her exclusion. Petitioner has received the review to which she is entitled. *Randall Dean Hopp*, DAB No. 2166, at 2-4

(2008); Act §§ 1128(c)(1), 1128(f)(1); 42 C.F.R. §§ 1001.2001, .2002, .2007; 1005.2, 1005.3; I.G. Ex. 1.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years effective June 20, 2011.

/s/
Keith W. Sickendick
Administrative Law Judge