Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Tiffiney Shawn Bentley
(OI File Number H-11-40836-9),

Petitioner

v.

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

Docket No. C-12-16

Decision No. CR2505

Date: February 22, 2012

DECISION

Petitioner, Tiffiney Shawn Bentley, 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 August 18, 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)).

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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 (HHS) notified Petitioner by letter dated July 29, 2011, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, the minimum statutory period. 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 Circuit Court of Jefferson County Kentucky, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing by letter dated September 28, 2011. The case was assigned to me for hearing and decision. A prehearing telephone conference was convened on October 24, 2011, the substance of which is memorialized in my order of the same date. During the prehearing conference, Petitioner declined to waive an oral hearing, and the I.G. requested to file a motion for summary judgment. Accordingly, I set a briefing schedule for the parties.

The I.G. filed a motion for summary judgment and a supporting brief (I.G. Br.) on November 21, 2011, with I.G. exhibits (I.G. Exs.) 1 through 5. Petitioner filed a brief in opposition to the I.G. motion on January 24, 2012 (P. Br.).[2] The I.G. filed a written waiver of its reply brief on January 25, 2012. No objections have been made to my consideration of the offered exhibits, and all are admitted.

II. Discussion

A. Applicable Law

Petitioner's rights to an administrative law judge (ALJ) hearing and judicial review of the final action of the HHS Secretary (Secretary) are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)).

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[2] Petitioner failed to file her response by the scheduled deadline of December 23, 2011. On January 6, 2012, I issued an Order to Show Cause why this matter should not be dismissed for abandonment. On January 24, 2012, Petitioner responded to that Order to Show Cause and filed her response to the I.G. motion. Petitioner's response brief is incorrectly dated December 21, 2011, and the response to the Order to Show Cause is incorrectly dated January 20, 2011. Both documents should have been dated January 24, 2011, the date they were filed and served by mailing.

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that is the basis for 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. 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 was 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 a 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) (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 Life Plus Ctr.*, DAB CR700 (2000); *New Millennium CMHC*, DAB CR672 (2000).

There is no genuine dispute as to any material fact in this case and the issue raised by Petitioner is an issue of law, *i.e.*, whether Petitioner was convicted within the meaning of section 1128(a)(1) of the Act. Accordingly, summary judgment is appropriate.

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

Petitioner was indicted by a grand jury on April 3, 2008, of two felony counts of causing false or fraudulent claims of $300 or more to be presented to the Kentucky Medicaid program, in violation of Kentucky law, between about April 10, 2006 and June 23, 2007. I.G. Ex. 2. On January 29, 2010, Petitioner pled guilty to the charges as part of a pretrial diversion program. I.G. Ex. 3. As part of the diversion program, the court sentenced Petitioner to five years of unsupervised probation with the option to request to be released from the diversion period after one year, if she paid restitution in the amount of $2,062 to the Attorney General's office. The order granting pretrial diversion explained that completion of the program would result in the charges being designated as dismissed-diverted. The order also reflects that Petitioner waived any right to seek an expungement. I.G. Ex. 3, at 2-3. On May 31, 2011, the criminal court set aside the Petitioner's guilty plea and dismissed-diverted the matter. I.G. Ex. 5.

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)):
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> > (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.

Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when: (1) 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; (2) there has been a finding of guilt in a federal, state, or local court; (3) a plea of guilty or no contest has been accepted in a federal, state, or local court; or (4) an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. In this case, the evidence shows that Petitioner pled guilty in exchange for being granted pretrial diversion. Petitioner's guilty pleas were accepted and the criminal court granted the motion for pretrial diversion. Upon successful completion of the conditions of her diversion program, Petitioners guilty pleas was set aside and the charges against her were dismissed. Accordingly, I conclude that Petitioner was "convicted" as that term is defined by section 1128(i) of the Act for purposes of exclusion pursuant to 1128(a)(1) of the Act, based on the acceptance of her guilty pleas and her participation in a deferred adjudication program.

I also conclude that Petitioner's conviction was program-related within the meaning of section 1128(a)(1) of the Act. The grand jury's characterization of the crimes to which Petitioner pled guilty—causing false or fraudulent claims to be presented to the Kentucky Medical Assistance Program— shows that Petitioner's criminal conduct was related to the delivery of an item or service under a state health care program. The charges allege that Petitioner made claims for services not actually rendered. I conclude that there is a "nexus or common-sense connection" between Petitioner's criminal conduct and the delivery of an item or service under Medicare or Medicaid. *Timothy Wayne Hensley*, DAB No. 2044 (2006); *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Neil Hirsch, M.D.*, DAB No. 1550 (1995); *Berton Siegel, D.O.* DAB No. 1467 (1994).

I conclude that elements of section 1128(a)(1) of the Act are satisfied, there is a basis for Petitioner's exclusion, and exclusion is required.

Petitioner does not dispute the facts. Petition argues that, though she believed she was innocent of the charges against her, she thought that acceptance of the pretrial diversion offer was in her best interests. She contends that when she accepted the diversion offer and pled guilty, she did not realize that she would be subject to exclusion by the I.G. and deprived her of her means of earning a living. Petitioner asserts that had she been aware that she was subject to exclusion, she may have rejected the deal and proceeded to trial on the charges. Petitioner argues that it is unfair that she should be excluded based on her participation in the pretrial diversion program, particularly since the charges were dismissed before the I.G. gave notice of the exclusion. Petitioner also asserts that her exclusion may discourage others from participation in pretrial diversion programs. Petitioner's arguments provide no grounds for relief. Congress requires exclusion in this case under section 1128(a)(1) of the Act. The I.G. and I have no discretion not to exclude Petitioner.

4. Pursuant to section 1128(c)(3)(B) of the Act, five years is the minimum 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.

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.

I have concluded that Petitioner's exclusion is required by section 1128(a)(1) of the Act. Accordingly, the minimum period of exclusion is five years, and that period is not unreasonable as a matter of law.

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 August 18, 2011.

/s/
Keith W. Sickendick
Administrative Law Judge