Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Beth Ann Lee, R.N.
(O.I. File No. H-12-40135-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-1258

Decision No. CR2735

Date: March 27, 2013

DECISION

Petitioner, Beth Ann Lee, R.N., appeals the determination of the Department of Health and Human Services' Inspector General (I.G.) to exclude her for five years from participation in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1). For the reasons explained below, I conclude that the I.G. has a basis for excluding Petitioner from program participation and that the five-year exclusion is mandated by law. Therefore, I affirm the I.G.'s exclusion of Petitioner.

I. Background and Procedural History

By letter dated July 31, 2012, the I.G. notified Petitioner, a registered nurse, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years pursuant to 42 U.S.C. § 1320a-7(a)(1). I.G. Exhibit (Ex.) 1. The I.G. advised Petitioner that her exclusion was based on her conviction

> in the Court of Common Pleas of Franklin County, Ohio, of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management or

> administrative services relating to the delivery of items or services, under any such program.

I.G. Ex. 1, at 1.

Petitioner timely filed her September 4, 2012 request for hearing (RFH) with the Civil Remedies Division. After this case was assigned to me, on October 18, 2012, I convened a prehearing conference by telephone. Before proceeding with any substantive or procedural issues, technical difficulties with the telephone connection made it necessary to reschedule the prehearing conference. On October 23, 2012, I reconvened the prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated October 24, 2012. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on November 27, 2012, along with seven proposed exhibits (I.G.'s Exs. 1-7). Petitioner subsequently filed eight proposed exhibits (P. Exs. 1-8), which the Civil Remedies Division received on January 14, 2013. As part of her submission, Petitioner provided written argument, which she labeled as "P. Ex. 1." On January 16, 2013, I ordered that Petitioner file a "short-form brief" to clarify her position on pertinent issues of the case. Petitioner subsequently filed her short-form brief (P. Br.) on January 28, 2013. The I.G. then filed a reply brief (I.G. Reply Br.) on February 20, 2013.

Petitioner did not object to any of the I.G.'s proposed exhibits. The I.G. submitted as one of its exhibits a declaration from a prosecuting attorney with the Health Care Fraud Unit of the Ohio Attorney General's Office. I.G. Ex. 3. The declaration, submitted under a caption for this case, appears to have been produced specifically for this proceeding. *See* I.G. Ex. 3, at 1. Although I may accept written direct testimony, the I.G. did not request that I do so in this case. 42 C.F.R. § 1005.16(b). To the contrary, the I.G. indicated in its brief that it did not have any testimony that it wanted to offer at a hearing. I.G. Br. at 6. Moreover, a significant portion of the attorney's declaration contains hearsay, including statements that Petitioner allegedly made to an investigator, now reported by the attorney. I.G. Ex. 3, at 1-2. While hearsay alone is not a basis to exclude an exhibit, *see* 42 C.F.R. § 1005.17(b), I nevertheless find that the declaration made specifically for this proceeding is impermissible hearsay because the declarant is not a witness for the I.G., yet the declarant provides substantive testimony specifically intended to support the I.G.'s case. The reports of an investigator, described through a non-witness cannot be used to support the I.G.'s case against Petitioner, especially when Petitioner will not be afforded an opportunity to cross-examine either the investigator or the declarant. *See* 42 C.F.R. § 1005.16(b). "At the discretion of the [administrative law judge], testimony (other than expert testimony) may be admitted in the form of a written statement." *Id.* For the reasons stated above, I do not admit I.G. Ex. 3 into the record. In the absence of objection, I.G. Exs. 1-2, 4-7, are admitted into the record.

The I.G. does not object to any of Petitioner's proposed exhibits. Petitioner submitted two exhibits consisting of letters from her former patients. P. Exs. 6, 7. Both of these letters appear to have been prepared for this proceeding. *See* P. Ex. 6 (dated December 2012); P. Ex. 7 (referencing Petitioner's exclusion). These letters amount to the written direct testimony of two witnesses who Petitioner cannot produce for cross-examination. 42 C.F.R. § 1005.16(b); P. Br. at 3. Further, due to the limited nature of my jurisdiction in this matter, *see* 42 C.F.R. § 1001.2007(a)(1)(i), the statements of these individuals are not relevant to whether there is a basis for the I.G. to impose an exclusion. I am required to exclude irrelevant and immaterial evidence. 42 C.F.R. § 1005.17(c). Accordingly, I exclude P. Exs. 6 and 7 from the record. In the absence of objection, all other proposed exhibits of Petitioner, P. Exs. 1-5, 8, are admitted into the record.

Both parties indicated in their briefs that an in-person hearing was unnecessary. I.G. Br. at 6; P. Br. at 2. Petitioner, however, stated that she wanted to provide direct testimony from six witnesses. P. Br. at 2-3. All six witnesses would testify about the "quality of care" Petitioner provided as a nurse. P. Br. at 3. Neither Petitioner's nursing abilities nor her reputation as a well-performing nurse are at issue in these proceedings. As indicated above, I am required to exclude irrelevant and immaterial evidence. 42 C.F.R. § 1005.17(c). Further, to the extent that Petitioner's witnesses would testify for the purpose of showing that Petitioner did not commit the criminal offense to which she pled guilty, I should not allow such testimony since Petitioner cannot "relitigate the facts underlying the state court proceedings." *Travers v. Shalala*, 20 F.3d. 993, 998 (9th Cir. 1994). Therefore, an in-person hearing for Petitioner to provide immaterial witness testimony is not required. I shall issue this decision on the basis of the written record.

II. Issue

The sole issue in this case is whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1). 42 C.F.R. § 1001.2007(a)(1)-(2).

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

The Secretary of Health and Human Services must exclude from participation in any federal health care program "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under subchapter XVIII of this chapter or under any State health care program." 42 U.S.C. § 1320a-7(a)(1).

A. *Petitioner pled guilty to theft by deception from the Ohio Department of Job and Family Services due to improper billing for nursing services.*

[1] My findings of fact and conclusions of law are set forth in italics and bold font as headings in this section of the decision.

Petitioner is a nurse currently licensed in Ohio. I.G. Ex. 2. On May 17, 2011, a grand jury in Franklin County, Ohio, indicted Petitioner on one count of theft by deception in violation of section 2913.02(A)(3) of the Ohio Revised Code. I.G. Ex. 4, at 1. According to the indictment, Petitioner illegally obtained money from the Ohio Department of Job and Family Services (JFS). In a consent agreement, Petitioner's conduct was characterized as overbilling for nursing services she provided. *See* I.G. Ex. 4, at 1; P. Ex. 2, at 2. The I.G. asserts, and Petitioner does not dispute, that JFS implements and operates the Ohio Medicaid program. I.G. Br. at 2. The indictment specifically charged that Petitioner, "as part of a course of criminal conduct, with purpose to deprive the owner, the Ohio Department of Job and Family Services of property to wit: obtaining money from the Ohio Department of Job and Family Services did knowingly obtain or exert control over said property, by deception, the value of the property or services being five thousand dollars ($5,000.00) or more, and less than one hundred thousand dollars ($100,000.00) . . . a Felony of the Fourth Degree." I.G. Ex. 4, at 1.

On November 16, 2011, Petitioner entered into an agreement to plead guilty to a lesser-included misdemeanor offense of theft by deception. I.G. Ex. 5. The trial court sentenced Petitioner according to the agreement, which included a three-day suspended jail sentence, three years of probation, and ordered Petitioner to pay $6,800 in restitution to JFS. I.G. Exs. 5, 6 at 2.

B. *Petitioner was convicted of a criminal offense for the purposes of 42 U.S.C. § 1320a-7(a)(1).*

Under 42 U.S.C. § 1320a-7(a)(1), Petitioner must be "convicted of a criminal offense" before the I.G. excludes her. The statute defines the term "convicted" to include "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); *see* 42 C.F.R. § 1001.2. Here, the Court of Common Pleas for Franklin County, Ohio accepted Petitioner's guilty plea to misdemeanor theft by deception. I.G. Ex. 6, at 1. Accordingly, Petitioner was "convicted" of a criminal offense within the meaning of the statute because she pleaded guilty to the offense and the state court accepted the plea.

Petitioner now claims that she is not guilty of the underlying offense to which she pleaded guilty. P. Br. at 1; P. Ex. 1, at 3. Rather, Petitioner asserts she was ill at the time of the criminal proceedings and agreed to plead guilty to expedite the end of the proceedings. P. Ex. 1, at 3-4; *see also* P. Ex. 4 (showing Petitioner's hospitalization in the month prior to her guilty plea). Petitioner claims that she had "no idea how [the prosecuting attorney] came up with [the restitution] figure and I have no idea how they came up with the seven year time period." P. Ex. 1, at 3. Petitioner also asserts that she pleaded guilty to the misdemeanor offense because she was told it would be removed

from her criminal record after one year and would not impact her ability to work as a nurse. RFH at 1; P. Br. at 1.

By regulation, "the basis for the underlying conviction, civil judgment or determination is not reviewable and the individual . . . may not collaterally attack it either on substantive or procedural grounds in this appeal." 42 C.F.R. § 1001.2007(d). Petitioner's arguments about her innocence and the motivating factors for her pleading guilty relate to the basis for the underlying conviction, and are not reviewable in this case. *Id.* Moreover, the fact that Petitioner pleaded guilty to a misdemeanor, which may be removed from her record after a year under Ohio law, is not material here. The applicable section of the statute does not differentiate between a felony or misdemeanor conviction for an offense related to the delivery of a health care item or service under Medicare or a State health care program. 42 U.S.C. § 1320a-7(a)(1). The statute requires, in relevant part, that Petitioner be convicted of any criminal offense related to those programs. *Id.* Also, even if Petitioner's conviction is later removed from her criminal record, the statute and implementing regulations mandate exclusion even if an individual's criminal record has been expunged. *Id.* § 1320a-7(i); 42 C.F.R. § 1001.2. Further, the statute and regulations expressly include offenses that are later expunged through a "first-offender program" as a "conviction" for purposes of exclusion. *Id.* Therefore, Petitioner's alleged innocence or motivations for pleading guilty cannot serve as a basis to reverse the exclusion.

C. *Petitioner must be excluded under 42 U.S.C. § 1320a-7(a)(1) because her conviction was for an offense related to the delivery of an item or service under a State health care program.*

The I.G. must exclude an individual from participation in any federal health care program if the individual was convicted under federal or state law of a criminal offense related to the delivery of an item or service under the Medicare program or a State health care program. 42 U.S.C. § 1320a-7(a)(1). Here, Count One of the indictment against Petitioner charged her with unlawfully obtaining, through deception, between $5,000 and $100,000 from JFS. I.G. Ex. 4, at 1. Petitioner pled to a lesser-included offense of this charge, but nevertheless admitted to theft from JFS. I.G. Ex. 5. As stated above, Petitioner does not dispute that JFS implements and operates the Ohio Medicaid program. I.G. Br. at 2; P. Br. at 2. Petitioner acknowledges that criminal charge and her conviction arose from improper billing of JFS for health care services. P. Ex. 1, at 2. ("[The investigators] asked if I had ever billed for a visit and paid someone else to provide the services. I answered yes because there had been a few time in an emergency situation when [the beneficiary] would not have any care if I had not."); *see also* P. Ex. 2, at 2 (consent agreement between the Ohio Board of Nursing and Petitioner, stating that Petitioner admitted to "overbilling" for nursing services). In addition, the trial court's order that Petitioner pay JFS restitution, through the "Health Care Fraud Section" of the state Attorney General's Office, is further evidence supporting that her criminal conduct was related to JFS and the Medicaid program. I.G. Ex. 5. The Medicaid program is a

"State health care program" for purposes of exclusion. *See* 42 C.F.R. § 1001.2 (defining "Medicaid" as "medical assistance provided under a State plan approved under Title XIX of the [Social Security] Act"). Thus, Petitioner's conviction is related to the delivery of services under a state health care program. I conclude that the record supports Petitioner's mandatory exclusion under section 1320a-7(a)(1). I.G. Exs. 4-6.

D. *Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B).*

Petitioner must be excluded for a minimum period of five years because, as discussed above, there is a basis to exclude Petitioner pursuant to the mandatory exclusion provision of the Act. 42 U.S.C. § 1320a-7(a)(1), (c)(3)(B); 42 C.F.R. § 1001.2007(a)(2). Petitioner points out that the Ohio nursing board suspended her nursing license for only three months, from which a reasonable inference may be that the criminal conduct to which she pleaded guilty was minor and that a five-year exclusion period is too harsh by comparison. *See* P. Ex. 1, at 4. That fact, however, is not material in this proceeding because the statute does not give me discretion to reduce a five-year exclusion. *See Manocchio v. Kusserow*, 961 F.2d 1539, 1542 (11th Cir. 1990) (upholding a five-year exclusion based on "making a $62.40 fraudulent demand against the Government"). The process has been described by one court in the following way:

> Conviction of a program-related offense as defined by § 1320a-7(i) is the triggering event that mandates the Secretary to impose a minimum five-year exclusion. The language—"[t]he Secretary shall exclude"—is mandatory, not discretionary. To determine whether Travers was convicted of a program-related offense, the Inspector General looked to the substance of the state proceedings and the nature of Travers' crime as charged by the State of Utah. As noted by the district court, "[i]t is not necessary or proper for the Inspector General to delve into the facts surrounding the conviction." Once he found that the Utah state court's disposition of the charge amounted to a conviction of a program-related offense, the Inspector General had no choice but to impose the mandatory 5–year exclusion under § 1320a-7(a)(1).

Travers, 20 F.3d. at 998 (citations omitted).

Nothing in the record of this case shows that Petitioner was deficient in the medical care she provided to her patients. On the contrary, Petitioner's patients appear to have been very satisfied with her services. However, the five-year exclusion imposed by the I.G. is the required minimum exclusion period.

IV. Conclusion

For the foregoing reasons, I affirm the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for the statutory five-year minimum period pursuant to 42 U.S.C. § 1320a-7(a)(1).

/s/
Scott Anderson
Administrative Law Judge