Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kawana Latrice Hickman,
(OI File No. H-13-43191-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1447

Decision No. CR3558

Date: January 7, 2015

DECISION

Petitioner, Kawana Latrice Hickman, appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude her from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) for five years. For the reasons discussed below, I find the I.G. was authorized to exclude Petitioner for the five-year minimum mandatory exclusionary period.

Background

The I.G. notified Petitioner, by letter dated April 30, 2014, that she was being excluded, pursuant to section 1128(a)(1) of the Act, from participating in Medicare, Medicaid, and other federal health care programs for the minimum mandatory period of five years. The I.G. advised Petitioner that the exclusion was based on her conviction in the State of Wisconsin, Dane County, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely filed a request for hearing stating that the I.G. erroneously excluded her under the mandatory section of the exclusion statute (section 1128(a)(1) of the Act). Petitioner asserted, based on her misdemeanor conviction, that the I.G. should have excluded her instead under the permissive sections of the statute at either sections 1128(b)(7) or 1128(b)(16).

I convened a prehearing conference with the parties, which I summarized in my August 7, 2014 Order and Schedule for Filing Briefs and Documentary Evidence (Scheduling Order). Pursuant to that Scheduling Order, I asked the parties to answer the questions on the short-form briefs sent to them, together with any additional arguments and supporting documents they wished to present. The I.G. filed his short-form brief (I.G. Br.) together with three exhibits (I.G. Exs. 1-3). Petitioner filed a short-form brief (P. Br.) together with four exhibits (P. Exs. 1-4). I.G. counsel notified me on November 19, 2014 that the I.G. would not be filing a reply. Neither party requested an in-person hearing or objected to the exhibits filed by the opposing party. I admit I.G. Exs. 1-3 and P. Exs. 1-4 into the record. The record is now closed, and I decide the case based on the written record.

Discussion

A. Issue

The only issue before me is whether the I.G. had a legitimate basis to exclude Petitioner from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(1) of the Act. If I find that the I.G. was authorized to exclude Petitioner, then I must uphold the I.G.'s exclusion because it is for the minimum mandatory period of five years. 42 C.F.R. § 1001.2007(a)(2).

B. Findings of Fact and Conclusions of Law

1. The I.G. had a legitimate basis to exclude Petitioner under section 1128(a)(1) of the Act.

The I.G. must exclude an individual where: 1) the individual has been convicted of a criminal offense which occurred after August 21, 1996; and 2) the criminal offense is related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1); *see also* 42 C.F.R. § 1001.101(c).

a. Petitioner was convicted of a criminal offense on May 1, 2013.

For exclusionary purposes, a conviction occurs when: 1) when a judgment of conviction has been entered against an individual by a federal, state, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to the criminal conduct has been expunged; 2) when there has been a finding of guilt against an individual by a federal, state or local court; 3) when a plea of guilty or

nolo contendere by an individual has been accepted by a federal, state, or local court; or 4) when an individual has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld. Act § 1128(i).

I find that Petitioner was convicted of a criminal offense pursuant to sections 1128(i)(1) and 1128(i)(3) of the Act. Specifically, on February 28, 2013, the Assistant Attorney General of the Wisconsin Department of Justice filed a three-count information against Petitioner. I.G. Ex. 3. The information charged that, during 2007 and 2008, Petitioner made false representations to the Wisconsin Medicaid program indicating that she had provided health services to a Medicare beneficiary when, in fact, she did not provide those services. I.G. Ex. 3. On May 1, 2013, in the Wisconsin Circuit Court for Dane County, the court entered a judgment of conviction accepting Petitioner's guilty plea to three counts of theft in violation of Wis. Stat. § 943.20(1)(d). I.G. Exs. 1, 2, 3. Petitioner was sentenced to two years of probation, paid restitution in advance of her conviction, and the court withheld her sentence.[1] I.G. Exs. 1, 2 at 2.

Petitioner disagrees with the I.G.'s characterization of her criminal offense as a felony (*see* I.G. Br. at 2) and explains that she was actually convicted of three misdemeanor counts of theft-false representation. P. Br. 4. I agree that Petitioner was not convicted of a felony offense here. Although I.G. counsel characterized Petitioner's conviction as a felony, the mandatory provision of section 1128(a)(1) applies to all criminal offenses and does not differentiate between felony and misdemeanor convictions. When an individual is convicted of a program-related misdemeanor involving the delivery of an item or service, the mandatory exclusion statute still applies, and the minimum period of exclusion is five years. *See* Act § 1128(c)(3)(B); *Gregory J. Salko, M.D.*, DAB No. 2437, at 4-5 (2012). Therefore, the I.G.'s mischaracterization is a harmless error that does not ultimately affect Petitioner's exclusion and exclusionary period. *See* 42 C.F.R. §1005.23.

b. Petitioner's criminal offense is related to the delivery of an item or service under Medicaid.

A conviction is related to the delivery of an item or service under Medicare or Medicaid if there is a common sense connection or nexus between the offense and the delivery of an item or service under Medicare or Medicaid. *Berton Siegel, D.O.*, DAB No. 1467 (1994). The facts behind Petitioner's conviction are undisputed and are set forth in the February 28, 2013 information. P. Br. at 2; I.G. Ex. 3. Petitioner pled guilty to three counts of theft as described in that information. I.G. Exs. 2, 3. The information describes how Petitioner, during 2007 and 2008, intentionally deceived the Wisconsin Medicaid

[1] Petitioner asserts that restitution to the state of Wisconsin was $5,829 but that she actually paid $5,830. P. Br. at 4; P. Ex. 3. The I.G. asserts that Petitioner paid restitution in the amount of $4,283.51. I.G. Br. at 2.

program when falsely representing that she provided services to a program beneficiary. I.G. Ex. 3. Such conduct is directly-related to providing a state Medicaid service.

2. The I.G. does not have the authority to exclude Petitioner under section 1128(b)(7) or section 1128(b)(16) of the Act in lieu of section 1128(a)(1).

Although admitting she was convicted of a criminal offense, Petitioner disputes that the I.G. is authorized to exclude her under section 1128(a)(1). Petitioner argues instead that her exclusion should be pursuant to the permissive exclusion authority of either section 1128(b)(7) (42 U.S.C. § 1320a-7(b)(7)) or 1128(b)(16) (42 U.S.C. § 1320a-7(b)(16)) of the Act. RFH; P. Br. at 2. Section 1128(b)(7) permits exclusion where the I.G. has determined that fraud, kickbacks and other prohibited activities have occurred. Section 1128(b)(16) permits exclusion in cases involving the making of false statements or misrepresentations of material facts.

Petitioner states:

> I was convicted of 3 counts of theft-false representation/misdemeanor during 2007/2008 during a period when I was self-employed and paid a third-party financial intermediary for my self-employment business to receive and process my hours and reimburse me for my self-employment. Pet. Ex. 1, 2. During this time frame, I misrepresented my business by giving the third party a list of dates that I said I worked but didn't which made it theft, I also misrepresented my business by not giving the third party a list of dates I worked because I had reached my limit of hours and assumed I could make up those hours. The result of doing this lead [sic] to my business making false statements or misrepresentations of material fact under section 1128(b)(16) . . . [or] fraud, kickback and other prohibited activities under 1128(b)(7) . . . of the Act. I believe the length of the exclusion is unreasonable.

P. Br. at 2.

The Department Appeals Board has reviewed the legislative history behind section 1128(a)(1) and determined, however, that the Congressional intent is clear. Congress intended section 1128(a)(1) to minimally require a five-year exclusion for criminal offenses relating to the Medicare and Medicaid programs, strengthening the law then existing which, while mandating exclusion, did not set a minimum length of exclusion for program-related criminal offenses. *See Jack W. Greene*, DAB No. 1078, at 8 (1989), *aff'd sub nom Greene v. Sullivan*, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). "[W]here a conviction falls within the terms of section 1128(a)(1), it is governed by that section. The fact that the conviction also meets the more inclusive elements of section 1128(b) . . . does not remove it from the ambit of section 1128(a)(1), and the I.G. must impose a

mandatory exclusion." *Boris Lipovsky*, DAB No. 1363, at 6 (1992). Here, where Petitioner's conviction, which directly involved state Medicaid beneficiaries, falls within the ambit of section 1128(a)(1), the I.G. has no discretion to instead consider a permissive exclusion.

Conclusion

I find the I.G. was authorized to exclude Petitioner under section 1128(a)(1) because Petitioner was convicted of a misdemeanor offense related to the delivery of a service under a state Medicaid program. The five-year exclusion that the I.G. imposed is mandatory as a matter of law and is effective 20 days from the I.G.'s exclusion notice dated April 30, 2014. 42 U.S.C. § 1320a-7(a); 42 C.F.R. § 1001.101(a).

/s/
Joseph Grow
Administrative Law Judge