Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Lola L. White
(OI File No. H-16-4-1097-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-765

Decision No. CR4808

Date: March 17, 2017

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services notified Lola L. White (Ms. White or Petitioner) that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years under 42 U.S.C. § 1320a-7(a)(3). Ms. White requested a hearing before an administrative law judge to dispute the exclusion. For the reasons stated below, I conclude that the IG has a basis for excluding Ms. White from program participation and affirm the five-year mandatory exclusion that the IG imposed on Petitioner.

I. Background

By letter dated May 31, 2016, the IG notified Ms. White that she was being excluded from Medicare, Medicaid, and all federal health care programs under 42 U.S.C. § 1320a-7(a)(3) for a period of five years. The IG informed Ms. White that the exclusion arose because she was convicted of a felony offense in the Circuit Court of the Fourth Judicial Circuit, Effingham County, Illinois. Further, the IG asserted that Ms. White's felony offense was related to fraud, theft, embezzlement, breach of fiduciary responsibility, or

other financial misconduct in connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of a health care item or service, or with respect to any act or omission in a health care program operated or financed by a federal, state or local government agency (other than Medicare or Medicaid). IG Exhibit (Ex.) 1.

Petitioner filed a timely request for hearing, which the Civil Remedies Division received on July 26, 2016. The case was assigned to me for a hearing and decision. On August 17, 2016, I held a telephonic prehearing conference, the substance of which I summarized in my August 18, 2016 Order and Schedule for Filing Briefs and Documentary Evidence (Order). In compliance with the Order, the IG filed a brief (IG Br.) and thirteen exhibits (IG Exs. 1-13). After requesting and receiving a 90-day extension of time, Petitioner filed a response brief (P. Br.) and five exhibits (P. Exs. 1-5).[1] The IG filed a reply brief (IG Reply Br.).

II. Decision on the Record

In the absence of objection, I admit IG Exs. 1-13.

The IG objected to P. Exs. 1-3 as exhibits only meant to show her innocence to the criminal charges to which she pled guilty. IG Reply Br. at 6. I overrule the IG's objection because P. Exs. 1-3 provide relevant background information to this case. Consequently, I admit P. Exs. 1-5 into the record.

Both parties indicated that they do not have any witness testimony to present and, consequently, do not believe that a hearing in this case necessary. IG Br. at 14; P. Br. at 6. Therefore, I issue this decision on the basis of the written record.

III. Issue

Whether the IG has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for five years under 42 U.S.C. § 1320a-7(a)(3). *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

IV. Findings of Fact, Conclusions of Law, and Analysis

My findings of fact and conclusions of law are set forth below in bold and italics.

[1] The .pdf version of Petitioner's brief uploaded to the DAB E-filing system includes a cover letter and the brief. Because the cover letter is not consecutively paginated with the brief, I cite to the .pdf pages rather than to the page numbers appearing on the brief.

The Secretary of Health and Human Services must exclude an individual from participation in Medicare, Medicaid, and all other federally-funded health care programs if that individual:

> has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in [section 1320a-7(a)(1)]) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

42 U.S.C. § 1320a-7(a)(3).

The five essential elements necessary in this case to support the exclusion are: (1) the individual to be excluded must have been convicted of an offense; (2) the offense must be a felony; (3) the felony conviction must have been related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (4) the felony offense must be in connection with the delivery of a health care item or service; and (5) the felonious conduct must have occurred after August 21, 1996. 42 U.S.C. § 1320a-7(a)(3).

A. Petitioner, the administrator of a nursing facility where RS was a resident, pled guilty to the felony charge of theft from RS's revocable trust for which Petitioner was a trustee, and the Circuit Court for Effingham County, Illinois (Circuit Court), found Petitioner guilty of that crime and ordered Petitioner to serve 24 months on probation as a "Second Chance Probation."[2]

Petitioner has been licensed as a nursing home administrator in the state of Illinois since 2002. IG Ex. 2.

In October 2004, RS signed a Revocable Trust Agreement in which he appointed himself as trustee and beneficiary. IG Ex. 7 at 2-11. RS made Petitioner and her husband successor co-trustees in the event that RS ceased serving as the trustee. IG Ex. 7 at 7; P. Br. at 2. One provision of this agreement was that in the event that RS was disabled, the

[2] In his prehearing exchange, the IG used the letters "RS" to refer to a resident in a nursing facility. I refer to the resident in the same way in this decision.

co-trustees of RS's trust would make distributions from the trust's principal and income for the "health, maintenance, and support of [RS]." IG Ex. 7 at 4. In June 2008, RS executed a General Power of Attorney in which he made Petitioner his attorney-in-fact. IG Ex. 6.

Petitioner became the administrator of Evergreen Nursing and Rehabilitation Center, LLC (Evergreen) on October 1, 2008. IG Ex. 3.

On September 25, 2014, Petitioner requested that RS sign a document providing her with the authority "to use funds from [RS's] trust account or other accounts to use as she feels is needed to not only care for me, but also any personal expenses she may have." P. Ex. 1; P. Br. at 2. Petitioner had to return any borrowed funds to the trust within five years; however, the document did not require payment of interest. P. Ex. 1. A month later, on October 25, 2014, RS became a resident at Evergreen, and was there until April 15, 2016. IG Ex. 3; P. Br. at 2. Shortly after being admitted to Evergreen, on November 3, 2014, Petitioner and her husband certified that RS "is unavailable [to serve as trustee] due to mental incapacity," and Petitioner and her husband took control of RS's revocable trust as co-trustees. IG Ex. 7 at 1. Medicare initially paid for RS's stay at Evergreen; however on January 23, 2015, Petitioner signed a statement for RS certifying that RS received notice that his Medicare Part A benefits would no longer pay for his nursing home care as of February 1, 2015. IG Ex. 8.

In the spring of 2015, Petitioner withdrew $70,000-$80,000 from RS's account and deposited that money in Petitioner's account. On June 5 and 9, 2015, the Illinois Department of Public Health received complaints from two sources against Evergreen related to theft. Although the Illinois Department of Public Health investigated Evergreen's involvement and ultimately concluded that it committed no violations, it referred the matter to the Illinois State Police's Medicaid Fraud Control Bureau for a criminal investigation. IG Ex. 4 at 1; P. Exs. 2, 3; Hearing Request Supporting Documents at 21.

State Police investigators uncovered that Petitioner had spent $112,000 on an on-line gambling website. When investigators interviewed her about the money she transferred from RS's revocable trust, Petitioner indicated that RS authorized her to take loans from the revocable trust. The investigators concluded that Petitioner did not adequately account for the money that she had transferred to herself from RS's revocable trust and estimated that Petitioner misappropriated $93,632.95 from RS. IG Exs. 4, 9.

In a February 8, 2016 letter, the Illinois Attorney General's Medicaid Fraud Bureau informed Petitioner that it believed that RS was not legally competent in September 2014 to grant Petitioner the right to take loans from the trust account. The Medicaid Fraud

Bureau also concluded that Petitioner's actions arose from her personal relationship with RS rather than from her position as administrator of Evergreen. Based on these conclusions, the Medicaid Fraud Bureau proposed resolving this matter in the following way:

1. The Medicaid Fraud Bureau would charge Petitioner with one count of Theft as a Class 3 felony, which would make Petitioner eligible for "Second Chance Probation" and ultimately for dismissal of the criminal case against her;

2. Petitioner would make full restitution to RS's revocable trust before the Medicaid Fraud Bureau filed the charge; and

3. Petitioner and her husband would resign as trustees of RS's revocable trust.

P. Ex. 4.

On April 1, 2016, the Medicaid Fraud Bureau filed a one-count Information in the Circuit Court charging Petitioner with Theft in violation of 720 Illinois Consolidated Statutes (ILCS) § 5/16-1(a)(1) at the class 3 felony level. IG Ex. 10. Also on April 1, 2016, Petitioner filed a written guilty plea to the theft charge. IG Ex. 11. Finally, on April 1, 2016, the Circuit Court confirmed that Petitioner entered a guilty plea to the theft charge and found that Petitioner was guilty of that charge. IG Ex. 12 at 1. The Circuit Court noted that Petitioner had already made full restitution to RS's revocable trust. IG Ex. 12 at 2. The Circuit Court ordered Petitioner to be placed on "Second Chance Probation" for 24 months and indicated that "[p]ursuant to 730 ILCS 5/5-6-3.4 the court does not enter judgment. If [Petitioner] successfully fulfills the terms and conditions of this probation, the court will discharge the [Petitioner] and the case against the [Petitioner] shall be dismissed." IG Ex. 12 at 1-2.

B. For purposes of 42 U.S.C. § 1320a-7(a)(3), Petitioner was convicted of an offense.

One of Petitioner's principal arguments in this case is that she has not been "convicted" of a criminal offense. Petitioner asserts that she "plead to second chance probation in order to prevent a trial and putting RS, family, friends, community and facility through the horrible publicity such trial would attract." P. Br. at 2. Petitioner also stated that:

> Petitioner did plead to second chance probation, with the understanding that it was not a conviction and that such findings would be removed from her record after completing all requirements. Second Chance Probation went into effect in Illinois on January 1, 2014 it gives non[-]violent individuals a second chance to contribute to society and keeps

> this one offense from becoming a life long barrier. It allows the removal of the charge to be cleared from your record upon successful completion of probation.
>
> The States Attorney for Effingham County wrote a letter stating that Petitioner was placed on second chance probation and her charges will be dismissed without conviction. (P Ex 5)
>
> . . .
>
> Petitioner did not steal monies from RS, there was a loan agreement between the two parties, and all monies have been paid back to the trust.

P. Br. at 3.

The letter from the State's Attorney for Effingham County confirmed that Petitioner received a "Second Chance Probation," which he characterized as a deferred prosecution. P. Ex. 5.

The IG argues that Petitioner has been convicted for exclusion purposes under 42 U.S.C. § 1320a-7(i)(2), which defines the word "convicted" to mean that "there has been a finding of guilt against the individual or entity by a Federal, State, or local court." The IG further asserts that Petitioner was "convicted" under the definition of that term in 42 U.S.C. § 1320a-7(i)(4) because "convicted" also means "when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." Finally, the IG points out that some of Petitioner's arguments related to her conviction are impermissible collateral attacks on the Circuit Court's action. IG Reply Br. at 2-4.

I agree with the IG that Petitioner was "convicted" of a criminal offense for purposes of exclusion under 42 U.S.C. § 1320a-7(i)(2) and (4). After Petitioner pled guilty, the Circuit Court clearly stated that it "finds that the [Petitioner] is GUILTY of the offense of THEFT, a Class 3 Felony." IG Ex. 12 at 1. Therefore, the record shows that she was "convicted" under the definition of that term in 42 U.S.C. § 1320a-7(i)(2).

In addition, Petitioner also entered a first offender program, a deferred adjudication program, or a program where a judgment of Conviction was withheld. The Circuit Court placed Petitioner on "Second Chance Probation." The state of Illinois established the "Second Chance Probation" program by statute for "any person who has not previously been convicted of, or placed on probation or conditional discharge for, any felony offense under the law of [Illinois], the laws of any other state, or the laws of the United States."

730 ILCS § 5/5-6-3.4(a). Further, "[u]pon fulfillment of the terms and conditions of probation, the court shall discharge the person and dismiss the proceedings against the person." 730 ILCS § 5/5-6-3.4(f).

Both Petitioner's description of and the statutory provisions related to the "Second Chance Probation" show that Petitioner entered a first offender program, a deferred adjudication program and/or a program that withholds a judgment of conviction. Although the State's Attorney stated in his letter that Petitioner was subject to a deferred prosecution, he was incorrect because the program has the characteristics of a deferred adjudication. The "Second Chance Probation" program required Petitioner to plead guilty and, "[u]pon violation of a term or condition of probation, the court may enter a judgment on its original finding of guilt and proceed as otherwise provided by law." 730 ILCS § 5/5-6-3.4(e). Therefore, in this way, the "Second Chance Probation" fits the definition of "convicted" under 42 U.S.C. § 1320a-7(i)(4). As stated in *Travers v. Shalala*:

> In a deferred adjudication . . . if the defendant does not live up to the terms of his agreement, he is not free to set aside his plea or proceed to trial—the court may simply enter a judgment of conviction. Under those circumstances, the entry of a judgment is a mere formality because the defendant has irrevocably committed himself to a plea of guilty or no contest which cannot be unilaterally withdrawn.

20 F.3d 993, 997 (9th Cir. 1994). The description in *Travers* of a deferred adjudication is essentially the same as the Illinois "Second Chance Probation" program.

Further, to the extent that Petitioner argues that her criminal record will be cleared following successful completion of the term of probation, such future effect is not relevant to determining whether she was convicted for purposes of exclusion. As stated by one court:

> Contrary to Rudman's assertion, the mere fact that, under Maryland law, Rudman's record could be expunged after three years if he successfully completes the term of probation does not erase the fact that Rudman entered into a "program where judgment of conviction has been withheld." The material inquiry is whether § 1320a-7(i)(4) treats Rudman's guilty plea as a conviction, not how state law may treat his guilty plea in the future.

Rudman v. Leavitt, 578 F. Supp. 2d 812, 815 (D. Md. 2008); *see also Gupton v. Leavitt*, 575 F. Supp. 2d 874, 880-881 (E.D. Tenn. 2008) (expunging of criminal record does not preclude exclusion).

Finally, I cannot consider Petitioner's assertion that she did not engage in theft and that she pled guilty for a variety of reasons, but not because she was guilty. These are impermissible collateral attacks on the Circuit Court's finding of guilt and ordering "Second Chance Probation" for her. 42 C.F.R. § 1001.2007(d).

For the reasons stated above, I conclude that Petitioner was "convicted" as that term is defined in 42 U.S.C. § 1320a-7(i)(2) and (4).

C. Petitioner was convicted of a felony offense.

The record is clear and I conclude that Petitioner pled guilty to violating 720 ILCS § 5/16-1(a)(1), a class 3 felony. IG Ex. 10 at 1; IG Ex. 11; IG Ex. 12 at 1; IG Ex. 13; P. Ex. 4 at 1; 720 ILCS § 5/16-1(b)(4).

D. Petitioner's felonious conduct was theft.

In order for a conviction to qualify as one mandating exclusion under 42 U.S.C. § 1320a-7(a)(3), it must be a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. The terms "related to" and "relating to" simply mean that there must be a nexus or common sense connection. *See James Randall Benham*, DAB No. 2042 (2006) (internal citations omitted); *see also Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "related to" in another part of section 1320a-7 as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation") (internal quotation marks omitted).

In the present case, the record shows that Petitioner was convicted of theft. IG Ex. 10 at 1; IG Ex. 11; IG Ex. 12 at 1; IG Ex. 13; P. Ex. 4 at 1; 720 ILCS § 5/16-1.

E. Petitioner's felonious conduct was in connection with the delivery of a health care item or service.

In order for the IG to exclude Petitioner under 42 U.S.C. § 1320a-7(a)(3), the felony offense that was the basis of Petitioner's conviction must have been for conduct in connection with the delivery of a health care item or service. To be "in connection with" the delivery of a health care item or service, there only needs to be a nexus or common sense connection to the delivery of a health care item or service. *Charice D. Curtis*, DAB No. 2430 at 5 (2011).

Petitioner argues that her conviction was not in connection with the delivery of a health care item or service. She points out that she was not convicted of health care fraud. Further, she provided evidence that: the Illinois Department of Public Health investigated her conduct and found no violations of its rules; the Medicaid Fraud Bureau found that her criminal conduct was based on Petitioner's personal relationship with RS and not in her role as Evergreen's administrator; and the state of Illinois has not taken any disciplinary action against Petitioner's nursing home administrator license. IG Ex. 2; P. Br. at 2-3; P. Exs. 2, 3, 5. Further, Petitioner asserts that as a co-trustee for RS's revocable trust, "RS needs [sic] and medical expenses were always paid." P. Br. at 2.

The IG argues that Petitioner's criminal conviction was connected to the delivery of health care items or services because RS was a resident at a nursing home at which Petitioner was the administrator and the record shows that Petitioner paid $20,860 in late medical fees on June 23, 2015, for RS.[3] IG Reply Br. at 4-5.

I agree with the IG that Petitioner's theft conviction was in connection with the delivery of a health care item of service. Although Petitioner and RS had a personal relationship that existed before he entered Evergreen, once RS entered Evergreen in October 2014, their relationship changed because RS was a resident at the nursing facility at which Petitioner was the administrator. *See* IG Ex. 3 (Petitioner was administrator of Evergreen while RS was a resident). Further, as a trustee of RS's revocable trust, who took over from RS as trustee because he was no longer mentally competent, she had the duty to disperse funds related to his health care, which included to Evergreen. IG Ex. 5; IG Ex. 7 at 1, 4, 6. Petitioner even signed for receipt of notice on RS's behalf that Medicare Part A was no longer going to cover RS's stay at Evergreen as of February 1, 2015. IG Ex. 8. On the whole, the record establishes that Petitioner was co-trustee of RS's revocable trust because he reached a point where he needed significant health care services and needed someone to pay for those services from his assets. This is why Petitioner had access to RS's assets in the first place. Therefore, I conclude that Petitioner's conviction was in connection with the delivery of a health care item or service.

F. Petitioner's criminal conduct occurred after August 21, 1996

To be excluded pursuant to 42 U.S.C. § 1320a-7(a)(3), Petitioner's felony offense must have occurred after August 21, 1996. The record shows that the conduct on which Petitioner's conviction was based occurred in 2014 and 2015. IG Exs. 9, 10, 13.

[3] While the IG argues that Petitioner paid $20,860 in *late* medical fees, it appears that the correct amount may actually have been $16,660, because the last of the five charges that Petitioner paid on June 23, 2015 ($4,200), was for services provided in the same month. Moreover, the IG did not lay a foundation for Evergreen's billing cycle, practices, or requirements sufficient to establish that Petitioner's June 23, 2015 payments on RS's behalf were "late" in any sense but a calendrical one.

G. Petitioner must be excluded for five years under.

I conclude that Petitioner's conviction meets the five elements of a mandatory exclusion under 42 U.S.C. § 1320a-7(a)(3), and, therefore, the IG had to impose on Petitioner an exclusion of at least five years in length. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.102(a).

V. Conclusion

I affirm the IG's determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for the statutory five-year minimum period pursuant to 42 U.S.C. § 1320a-7(a)(3).

/s/
Scott Anderson
Administrative Law Judge