Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Marlene Cesar
(OI File No. M-10-40238-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-271

Decision No. CR4869

Date: June 16, 2017

DECISION

Petitioner, Marlene Cesar, 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 December 20, 2016. Petitioner's exclusion for five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background

The Inspector General (I.G.) of the U.S. Department of Health and Human Services notified Petitioner by letter dated November 30, 2016, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for five years. The I.G. cited section 1128(a)(1) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based upon Petitioner's conviction in the United States District Court for the Southern District of Florida, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Exhibit (Ex.) 1.

Petitioner timely requested a hearing on January 12, 2017 (RFH). On January 26, 2017, the case was assigned to me to hear and decide. I convened a telephone prehearing

conference on February 6, 2017, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence issued on February 6, 2017. On March 7, 2017, the I.G. filed his brief and I.G. Exs. 1 through 4. On March 15, 2017, Petitioner waived an oral hearing. On April 10, 2017, Petitioner filed a cross-motion for summary judgment (P. Br.) and a copy of the transcript of the U.S. District Court criminal proceedings that resulted in Petitioner's conviction (Departmental Appeals Board Electronic Filing System (DAB E-File Item 9a), which I treat as P. Ex. 1. The I.G. filed a reply brief on April 20, 2017 (I.G. Reply). Neither party objected to the opposing party's exhibits and I.G. Exs. 1 through 4 and P. Ex. 1 are admitted and considered as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

Pursuant to section 1128(a) of the Act, the Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of, among other things: a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1). The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a), (c).[1]

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). The Secretary has published regulations that establish aggravating factors that the I.G. may consider to extend the period of exclusion beyond the minimum five-year period, as well as mitigating factors that may be considered only if the minimum five-year period is extended. 42 C.F.R. § 1001.102(b), (c).

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).

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[1] Citations are to the 2015 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

B. Issues

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

> Whether the I.G. has a basis for excluding an individual or entity from participating in Medicare, Medicaid, and all other federal health care programs; and
>
> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

When, as in this case, the I.G. imposes the minimum authorized five-year exclusion under section 1128(a) of the Act, there is no issue as to whether the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2).

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

My conclusions of law are set forth in bold text followed by my findings of fact and analysis.

1. Petitioner timely filed her request for hearing, and I have jurisdiction.

2. Summary judgment is appropriate.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

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 Secretary has provided by regulation that a sanctioned party has the right to a hearing before an ALJ, and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2-.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). On March 15, 2017, Petitioner filed a document that indicates she waived her right to an oral hearing. However, on April 10, 2017, Petitioner filed a response to the I.G.'s motion for summary judgment and a cross-motion for summary judgment. A waiver of oral hearing generally obviates the need to attempt to resolve a case on summary judgment as the ALJ can proceed to decide the case on the merits based on the briefs and documentary evidence. Petitioner's April 10, 2017 cross-

motion for summary judgment suggests that Petitioner did not understand the effect of her waiver of oral hearing or that she intended to withdraw the waiver. Out of an abundance of caution, I treat Petitioner's cross-motion to be a withdrawal of her waiver of oral hearing and proceed to decide whether or not summary judgment is appropriate. Because I conclude summary judgment is appropriate, I conclude it is unnecessary to clarify whether or not Petitioner actually intended to waive or withdraw her waiver of oral hearing.

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 which, if true, would refute the facts relied upon by the moving party. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & 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 Millennium CMHC*, DAB CR672 (2000); *New Life Plus Ctr.*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. Petitioner does not deny that: she entered into a plea agreement with the advice and assistance of counsel; the trial court accepted her guilty plea and found her guilty of misdemeanor theft of government services; and the court ordered Petitioner to pay a $150 fine and $50 assessment. I.G. Exs. 2, 3. Petitioner argues that her offense was not related to the delivery of an item or service under Medicare, an element required to trigger exclusion under section 1128(a)(1) of the Act. She also argues that if exclusion is appropriate, it should have been a permissive exclusion of three or fewer years pursuant to section 1128(b)(1)(A) of the Act rather than a mandatory five-year exclusion pursuant to section 1128(a) of the Act. The issues Petitioner raises are issues of law that must be resolved against her. There is no genuine dispute as to any material fact. Accordingly, I conclude that summary judgment is appropriate.

3. Section 1128(a)(1) of the Act requires Petitioner's exclusion from participation in Medicare, Medicaid, and all other federal health care programs.

a. Facts

The material facts are undisputed. On July 1, 2016, Petitioner entered a guilty plea to one misdemeanor count of a superseding indictment charging her with theft of government services on or about July 1, 2011, in violation of 18 U.S.C. § 641. Petitioner's guilty plea was accepted and she was sentenced to pay a $150 fine and a $50 assessment. I.G. Exs. 2, 3, 4 at 1; P. Ex. 1.

Petitioner agreed as part of her plea inquiry and in her brief before me, that if the criminal case against her had gone to trial, the government could have proved beyond reasonable doubt that:

> [O]n or about July 1, 2011, services were billed in the approximate amount of $400 for a patient with the initials S.D. This was a Medicare claim made by Biscayne Milieu where the [Petitioner] worked. The Government would have shown that the [Petitioner] participated in the treatment of this particular patient on or about that date and that, thus, she did satisfy the elements of knowingly converting to the use of another, that being the owners of Biscayne Milieu, a thing of value of the United States, that is, Medicare benefits from Centers For Medicare and Medicaid Services, an agency of the United States, totalling [sic] less than $1,000 with the intent to deprive the United States and CMS of the use and benefit of that money in violation of Title 18, United States Code, Section 641(n)(2).

P. Ex. 1 at 10-11; P. Br. at 2.

b. Analysis

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides in relevant part:

> (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.

Act § 1128(a)(1). Congress has, by the plain language of section 1128(a)(1) of the Act, required the Secretary to exclude from participation in Medicare, Medicaid, and all federal health care programs any individual or entity: (1) convicted of a criminal offense; (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. An individual or entity is considered to have been "convicted" of an offense if, among other things, "a

plea of guilty or nolo contendre by the individual or entity has been accepted by a Federal, State, or local court." Act § 1128(i)(3) (42 U.S.C. § 1320a-7(i)(3)). Here, the trial court accepted Petitioner's guilty plea to a misdemeanor offense of theft of government services. I.G. Ex. 3. The court's acceptance of Petitioner's guilty plea constitutes a conviction for purposes of her exclusion under section 1128(a)(1) of the Act. Act § 1128(i)(3).

The only issue in this case is whether the I.G. has a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act. Petitioner does not dispute that she was convicted of a criminal offense. She also does not dispute that by her guilty plea she agreed that she knowingly participated in the unlawful conversion of Medicare funds for the benefit of her employer. Petitioner argues that her misdemeanor conviction of theft of government services for less than $1,000 does not support a conclusion that the conduct of which she was convicted is directly related to the delivery of a health care item or service. P. Br. at 2-3. Petitioner argues that: she was merely an employee of Biscayne Milieu Health Center; there was no billing of Medicare using Petitioner's Medicare enrollment and billing privileges; and Petitioner never made a claim herself to Medicare or Medicaid. Petitioner correctly notes that the government moved to dismiss the original health care fraud charges and allowed Petitioner to plead guilty to a simple misdemeanor. P. Br. at 2. I accept these facts asserted by Petitioner as true for purposes of summary judgment. However, Petitioner's argument that her conduct was not related to the delivery of an item or service under Medicare must be resolved against her as a matter of law based on the undisputed facts. The Board has repeatedly opined that for an offense to trigger exclusion pursuant to section 1128(a)(1) of the Act, the offense need only be in connection with the delivery of a health care item or service, and all that needs to be shown to satisfy that element is a common sense connection or nexus between the conviction and the delivery of a health care item or service under Medicare or Medicaid. The Board has stated that the facts upon which a conviction was predicated may be considered in deciding whether the required nexus exists. *Kimbrell Colburn*, DAB No. 2683 at 5 (2016). In this case, there is an obvious nexus between Petitioner's offense and the delivery of a health care item or service under Medicare. Petitioner conceded by her guilty plea that she provided treatment for a Medicare-eligible beneficiary and that treatment was the basis for a claim to Medicare that resulted in the unlawful conversion of Medicare funds to the benefit of her employer. P. Ex. 1 at 10-11; P. Br. at 2; *Colburn*, DAB No. 2683 at 5-6. Based on the undisputed facts and drawing all favorable inferences for Petitioner, I conclude as a matter of law that there is a nexus between Petitioner's criminal conduct and the delivery of an item or service under Medicare. Accordingly, I conclude that all elements that trigger a mandatory exclusion pursuant to section 1128(a)(1) of the Act are satisfied and the I.G. has a basis to exclude Petitioner.

Petitioner argues that, if there is a basis for exclusion, it is for exclusion under section 1128(b)(1)(A) of the Act. Petitioner argues that if exclusion is necessary, it should be a permissive exclusion of three or fewer years. She cites as justification that she played a

minor role and was convicted based on a negotiated plea agreement of theft of government funds, rather than a program related crime within the meaning of section 1128(a)(1) of the Act. P. Br. at 3. This argument is also without merit. The Board has been consistent that when a conviction falls within the scope of section 1128(a)(1) of the Act, that section controls even if the conviction may be characterized as being subject to section 1128(b) of the Act. Congress mandated exclusion under section 1128(a)(1) of the Act and gave the I.G. no discretion to impose a permissive exclusion under section 1128(b) of the Act when the elements for a mandatory exclusion exist. *Colburn*, DAB No. 2683 at 9; *Lorna Fay Gardner*, DAB No. 1733 (2000); *Boris Lipovsky, M.D.*, DAB No. 1363 at 4-5 (1992).

4. Section 1128(c)(3)(B) of the Act requires a minimum exclusion period of five years for any exclusion action pursuant to section 1128(a) of the Act.

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

Congress established five years as the minimum period of exclusion for exclusions pursuant to section 1128(a) of the Act. Act § 1128(c)(3)(B). Pursuant to 42 C.F.R. § 1001.2007(a)(2), when the I.G. imposes an exclusion pursuant to section 1128(a) of the Act for the statutory minimum period of five years, there is no issue of whether or not the period is unreasonable. Accordingly, I conclude that Petitioner's exclusion for a period of five years is not unreasonable as a matter of law.

III. Conclusion

For all of the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum of five years, effective December 20, 2016.

/s/
Keith W. Sickendick
Administrative Law Judge