

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jennifer L. DeFilippo
(OI File Number 2-10-40025-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-898

Decision No. CR2302

Date: January 3, 2011

DECISION

Petitioner, Jennifer L. DeFilippo, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(3) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(3)), effective July 20, 2010. Petitioner is excluded for a minimum period of three years.*

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated June 30, 2010, that she was being excluded from participating in Medicare, Medicaid, and all federal health care programs for a minimum period of three years. The I.G. advised Petitioner that she was being excluded pursuant to section 1128(b)(3) of the Act based on her misdemeanor conviction in the Johnstown Town Court of the State of New York, of a criminal offense

* 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.

related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under federal or state law.

Petitioner timely requested a hearing by letter dated August 2, 2010. The case was assigned to me for hearing and decision on August 13, 2010. A prehearing telephone conference was convened on August 30, 2010, the substance of which is memorialized in my Order issued on that date. During the prehearing conference the parties waived an oral hearing and agreed that the case may be decided based on the parties' briefs and documentary evidence, and I set a briefing schedule.

The I.G. filed an opening brief (I.G. Br.) on September 29, 2010, with I.G. exhibits (I.G. Exs.) 1 through 9. Petitioner filed her brief (P. Br.) on October 25, 2010, with Petitioner's exhibits (P. Exs.) 1 through 7. The I.G. filed a reply brief on November 15, 2010 (I.G. Reply). No objection has been made to the admissibility of any of the proffered exhibits. I.G. Exs. 1 through 9 and P. Exs. 1 through 7 are admitted.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights 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(b) (42 U.S.C. § 1320a-7(b)), the Secretary may exclude certain individuals and entities from participation in the Medicare and Medicaid programs. Section 1128(b)(3) of the Act permits the Secretary to exclude from participation any individual convicted of a misdemeanor relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court, whether an appeal is pending or the record of the conviction is expunged; (2) a court finds guilt; (3) a court accepts a plea of guilty or no contest; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld.

Section 1128(c)(3)(D) of the Act (42 U.S.C. § 1320a-7(c)(3)(D)) provides that an exclusion imposed under section 1128(b)(3) of the Act will be for three years, unless aggravating or mitigating factors justify a longer or shorter period. The Secretary has promulgated regulations listing the factors that may be considered for lengthening the period of exclusion beyond three years or shortening the exclusion to less than three years. 42 C.F.R. § 1001.401(c)(2) and (3).

The Secretary has established the following mitigating factors and provided that only they may be considered for shortening the period of exclusion:

- (i) The individual's or entity's cooperation with Federal or State officials resulted in –
 - (A) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs.
 - (B) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
 - (C) The imposition of a civil money penalty against others; or
- (ii) Alternative sources of the type of health care items or services furnished by the individual or entity are not available.

42 C.F.R. § 1001.401(c)(3).

Petitioner bears the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances. The I.G. bears the burden of going forward and the burden of persuasion with respect to all other issues. 42 C.F.R. § 1005.15.

B. Issues

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

- Whether there is a basis for the imposition of the exclusion; and
- Whether the length of the period of 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. There is a basis to exclude Petitioner pursuant to section 1128(b)(3) of the Act.**

3. Petitioner's three-year exclusion is not unreasonable as a matter of law.

Petitioner concedes that there is a basis for her exclusion pursuant to section 1128(b)(3) of the Act. P. Br. at 2. Petitioner argues, however, that the period of her exclusion should be less than three years based upon the presence of a mitigating factor.

Petitioner was licensed by the State of New York to practice as a registered physician assistant in January 1998. P. Ex. 1, at 1. Petitioner does not dispute that on November 19, 2008, in the Johnstown Town Court, State of New York, she pled guilty to forgery in the third degree. Petitioner was sentenced on March 3, 2009, to three years probation. I.G. Ex. 4, at 1; I.G. Exs. 7, 8. Petitioner's conviction was based on her providing a forged prescription for Lortab to her patient, Melissa Gifford, in exchange for a portion of the drug. P. Ex. 1, at 2. Petitioner asserts that she cooperated with the New York State Bureau of Narcotics Enforcement and the New York State Police and that her cooperation resulted in the arrest and conviction of Melissa Gifford, who was sentenced to three years probation on September 8, 2008. P. Ex. 1, at 3; P. Br. at 3-4. The I.G. does not deny that Melissa Gifford was convicted of criminal possession of a controlled substance in the seventh degree or that she was sentenced to three years probation on September 8, 2008. I.G. Ex. 4, at 1. The I.G. argues, however, that Petitioner has not established by a preponderance of the evidence that her cooperation resulted in Melissa Gifford's conviction. I.G. Reply at 3-4. I agree.

Exclusions imposed under section 1128(b)(3) of the Act are for three years unless aggravating or mitigating factors justify a longer or shorter period. Petitioner has conceded that there is a basis for her exclusion pursuant to section 1128(b)(3) of the Act. Therefore, she must be excluded from participation in federal and state programs for a minimum of three years, unless I can conclude that she has established by a preponderance of the evidence that there is a mitigating factor under 42 C.F.R. § 1001.401(c)(3). Petitioner argues that she is entitled to consideration of the mitigating factor established by 42 C.F.R. § 1001.401(c)(3)(i)(A), on the theory that her cooperation led to the conviction of Melissa Gifford. P. Br. at 3-4.

Petitioner relies on her pre-sentence investigation report (I.G. Ex. 4) as evidence of the existence of the mitigating factor. The report states the Petitioner was subject to a pre-sentence investigation interview on December 18, 2008. The report states that Petitioner was cooperative and summarizes the facts of Petitioner criminal conduct, apparently based upon Petitioner's statements during the interview. I.G. Ex. 4, at 2. The pre-sentence investigation report also states that the investigating officer, Rick Boettcher, was interviewed and he stated that Petitioner was cooperative "during the investigation, giving a four-page statement." I.G. Ex. 4, at 1-2. I infer that Investigator Boettcher was referring to the investigation prior to Petitioner's entry of a guilty plea on November 19, 2008 (I.G. Ex. 8) and her plea agreement that was accepted by the state on November 12,

2008 (I.G. Ex. 7). I conclude that the pre-sentence investigation report is not sufficient to satisfy Petitioner's burden to prove the existence of the mitigating factor. Petitioner's cooperation during the pre-sentence investigation interview on December 18, 2008 was three months after Melissa Gifford's conviction and sentencing on September 8, 2008 (I.G. Ex. 4, at 1). Petitioner's plea agreement was accepted by the state on November 12, 2008 and she pled guilty on November 19, 2008, both events two months after Gifford's conviction and sentencing. Furthermore, the pre-sentence report does not indicate when she cooperated with Investigator Boettcher and gave her four-page statement; the report does not state what if any information Petitioner gave Investigator Boettcher regarding Gifford; and the report does not state that law enforcement authorities relied upon any information that Petitioner provided in prosecuting and convicting Melissa Gifford.

Petitioner asserts in her affidavit that she offered her full cooperation with law enforcement and that her cooperation and voluntary disclosure led to the arrest and conviction of Melissa Gifford. P. Ex. 1, at 3. I have no doubt that Petitioner believes she fully cooperated with law enforcement. However, Petitioner provides no detail as to when she cooperated, what information was provided, or how she knows that law enforcement relied upon or used the information she provided. I cannot infer, based upon the evidence that I have, that Petitioner's cooperation led to the arrest or conviction of another.

I conclude that Petitioner has failed to establish by a preponderance of the evidence that the mitigating factor under 42 C.F.R. § 1001.401(c)(3)(i)(A) is present in this case.

Petitioner also argues several facts that I have no authority to treat as grounds to mitigate the period of exclusion in this case. Petitioner argues that she has been drug-free for 27 months; that she has taken responsibility for her actions by, among other things, attending therapy sessions and AA meetings; and that she is fully compliant with all terms of her probation. Petitioner also informs me that the New York Office of the Medicaid Inspector General reduced her exclusion from that program to a censure. P. Br. at 4-5; P. Exs. 1-7. It is laudable that Petitioner has taken responsibility for her actions and remained drug-free and compliant with her probation, but her good conduct does not constitute a mitigating factor under the regulations. Similarly, the New York Medicaid Inspector General's mitigation of Petitioner's exclusion from Medicaid to a censure is also not a mitigating factor recognized by the regulations.

Petitioner's exclusion for three years is required by the Act as there are no mitigating factors. Accordingly, Petitioner's exclusion for three years is not unreasonable as a matter of law.

