Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	Date: March 5, 2008
Community Alternatives Missouri, Inc., d/b/a Turtle Creek Group Home,	)	Docket No. C-08-16
	)	Decision No. CR1746
Petitioner,	)	
v.	)	
The Inspector General.	)	

DECISION

Petitioner, Community Alternatives Missouri, Inc., d/b/a Turtle Creek Group Home, is excluded from participation in Medicare, Medicaid and all federal health care programs pursuant to section 1128(a)(2) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(2)), effective August 20, 2007, for the minimum statutory period of five years.[1]

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated July 31, 2007, that it was being excluded from participation in Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(2) of the Act. The I.G. cites as the basis for Petitioner's exclusion its conviction in the 30th Judicial Circuit, Circuit Court of Polk County, Missouri, of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service.

[1] 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.

Petitioner requested a hearing by letter dated October 3, 2007. The case was assigned to me on October 24, 2007. I held a prehearing conference in the case on November 15, 2007. As memorialized in my Order dated November 21, 2007, during the conference the parties agreed that only legal issues were in dispute and they further agreed to waive an in-person hearing and have the case decided on documents and briefs. The I.G. filed a brief (I.G. Br.), accompanied by three exhibits (I.G. Exs.) 1-3, on December 17, 2007. Petitioner submitted a response (P. Br.), accompanied by two exhibits (P. Exs.) 1-2, on January 15, 2008. The I.G. submitted a reply (I.G. Reply), accompanied by two more exhibits, I.G. Exs. 4-5, on January 31, 2008. Petitioner requested leave to submit a sur-reply (P. Reply) and did so on February 21, 2008, accompanied by P. Ex. 3.[2] I accept Petitioner's sur-reply and I admit into evidence I.G. Exs. 1-5 and P. Exs. 1-3.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the parties' pleadings and the exhibits submitted.

1. On November 28, 2001, Petitioner, a residential facility licensed by the Missouri Department of Mental Health, was charged with one count of involuntary manslaughter and one count of resident neglect in the 30th Judicial Circuit Court of Polk County, Missouri. P. Br. at 2-3; I.G. Exs. 2, at 1; 3, at 1.

2. On July 25, 2006, a jury returned a verdict of "not guilty" with respect to the charge of involuntary manslaughter, and a verdict of "guilty" on the resident neglect charge. P. Br. at 3; I.G. Ex. 2, at 1.

3. The information upon which Petitioner was convicted, alleged that between November 28, 2001 and January 10, 2002, Petitioner's employees failed to provide necessary health care services to a resident of Petitioner's facility and the failure presented an "imminent danger to the health, safety, or welfare" of that resident. I.G. Ex. 3, at 1.

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[2] By letter dated February 25, 2008, Petitioner informed me that Petitioner's appeal of its conviction was transferred to the Supreme Court of Missouri. As discussed below, Petitioner's appeal of its criminal conviction, and where that appeal is currently pending, is irrelevant to my decision here.

4. On September 28, 2006, Petitioner was ordered to pay a $5000 fine. I.G. Ex. 2, at 1.

5. Petitioner is appealing its criminal conviction. P. Exs. 1, 2.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. Petitioner was convicted within the meaning of section 1128(i) of the Act.

3. Petitioner's conviction is related to the neglect of a patient (here a resident receiving health care services in Petitioner's facility) in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

4. Petitioner's exclusion is mandated by section 1128(a)(2) of the Act.

5. A five-year exclusion is mandatory pursuant to section 1128(c)(3)(B) of the Act.

6. Exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b).

7. I have no authority to stay Petitioner's exclusion pending final disposition of Petitioner's appeal of its criminal conviction.

8. Petitioner received appropriate notice of its exclusion and the opportunity to request a hearing before an administrative law judge (ALJ) on issues an ALJ is authorized to hear.

9. I do not have the authority to address Constitutional issues.

C. Applicable Law

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

Pursuant to section 1128(a)(2) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs "(a)ny individual or entity that has been convicted under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." One is convicted of a criminal offense when a judgment of conviction is entered against an individual or entity by a state or federal court, regardless of whether there is an appeal pending or the judgment of conviction or other record is ultimately expunged; or there is a finding of guilt; or a plea of guilty or no contest is accepted; or the individual or entity enters a first offender, deferred adjudication, or similar arrangement where a judgment of conviction is withheld. Act § 1128(i).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years.

An excluded entity is entitled to reasonable notice and an opportunity for hearing under section 205 of the Act. Act § 1128(f) (42 U.S.C. § 1320a-7(f)).

D. Issues

The Secretary has by regulation limited my scope of review to two issues in a case where exclusion is based on section 1128(a)(2) of the Act:

1. Whether there is a basis for the imposition of the exclusion; and

2. Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). Here, where the I.G. has excluded Petitioner for the minimum mandatory period, the only issue for my consideration is whether there is a basis for the imposition of the exclusion.

E. Analysis

There are no issues of material fact for resolution here. The facts necessary to my decision are either admitted or not disputed and set forth in the Findings of Fact above. There is a basis for Petitioner's exclusion. Petitioner's conviction in a Missouri state court of failure to provide necessary health care services to a resident of its facility clearly constitutes patient neglect in connection with the delivery of a health care item or service. Congress has mandated that an individual or entity convicted of such an offense be

excluded by the Secretary from participation in Medicare, Medicaid and all federal health care programs. Act § 1128(a)(2). Five years is the minimum period of exclusion authorized by Congress when exclusion is pursuant to section 1128(a). Act § 1128(c)(3)(B).

Petitioner admits the "legal tenets" underlying this case, stating that: an entity must be excluded if convicted of a criminal offense under section 1128(a)(2) of the Act; that the mandatory length of an exclusion is five years when there is a conviction subject to section 1128(a)(2) of the Act; that the conviction underlying a section 1128(a)(2) exclusion cannot be collaterally attacked; that pre-exclusion administrative hearings are only permitted in limited cases and this is not one of those cases; and that the regulations state that a section 1128(a)(2) exclusion is effective 20 days from the date of the exclusion notice. P. Br. at 4.

Petitioner asserts that it is not asking me to find that the effective date of the exclusion is invalid or to enjoin the Secretary, refuse to adhere to the regulation at 42 C.F.R. § 1001.2007(a)(1)(i), or invalidate or refuse to follow federal statutes, regulations or secretarial delegations of authority under 42 C.F.R. § 1005.4(c)(4). P. Reply at 3-4. Instead, Petitioner argues that Constitutional principles preclude its exclusion prior to the exhaustion of its appeal of its underlying conviction. Petitioner asserts that such pre-exhaustion penalties are a violation of its property and/or liberty interests under the due process clause of the Fifth Amendment. Petitioner notes that the statute and regulations do not provide for effective "restitution, compensation, remedy, or redress" in the event its conviction is reversed because its sole remedy would be prospective reinstatement and it could not be made whole for the "injurious effects" of its exclusion. Alternatively, Petitioner requests that I stay the case pending the disposition of Petitioner's appeal of its criminal conviction. P. Br. at 5; P. Reply at 4-5.

Petitioner cites *Erickson v. U.S. ex. rel. Department of Health and Human Services*, 67 F. 3d 858 (9th Cir. 1995), a case which does not support Petitioner's contentions and which Petitioner attempts to distinguish. Petitioner states that in *Erickson*, rather than pursuing an administrative remedy, the individual and entity involved sought and obtained a temporary restraining order and permanent injunction from a federal district court prohibiting exclusion until final disposition of any appeals from the criminal conviction. On appeal, the Ninth Circuit reversed and dissolved the permanent injunction. The Ninth Circuit reasoned that the excluded individual and entity did not have a protected property interest in continued participation in federal health programs (although there was a protected liberty interest with respect to their reputations). Moreover, the excluded

individual and entity had received all process to which they were due, the risk of an erroneous deprivation was remote, and the government's interest in protecting against a waste of public resources outweighed the excluded individual's and entity's interest in preventing exclusion and publication of exclusion.

In its attempt to distinguish *Erickson* from its own situation, Petitioner argues that the Ninth Circuit's constitutional analysis is faulty. In particular, Petitioner argues that the Ninth Circuit failed to recognize or mention that the regulatory scheme underlying its exclusion offers excluded individuals and entities no prospect of relief in the event their underlying conviction is reversed. Petitioner asserts this factor "tilts the constitutional balance against the government's interest." Petitioner posits that the government could rectify this situation through "various options," including synchronizing the effective date of the exclusion with the final dates of disposition of the underlying criminal cases, or furnishing other relief, such as money restitution, in cases where any exclusion effectuated was "proved wrong." Petitioner asserts that because the government has chosen not to invoke such options, its practice of imposing exclusions prior to final case disposition is unconstitutional. P. Br. at 5-6.

In conclusion, Petitioner states that I should deny the I.G.'s motion for summary affirmance and reverse the exclusion, holding that an exclusion should become effective only when there is an adverse final disposition of the criminal case on which the exclusion is based. Alternatively, Petitioner asserts that I should stay the exclusion pending final disposition of the appeal of its criminal case. P. Br. at 7; P. Reply at 4-5. Petitioner's arguments are unavailing.[3]

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[3] With its reply brief Petitioner attaches (as P. Ex. 3) an order in the case of *Victor Valley Community Hospital v. Leavitt,* Case No. EDCV 07-1189-VAP (OPx) (C.D. Cal. Jan. 10, 2008), in which the court issued a preliminary injunction enjoining the Department from canceling the plaintiff's approval to receive Medicare and Medicaid payments pending a hearing. Petitioner asserts that in granting the injunction the court examined the relevant law and determined that cancellation of approval for the plaintiff's clinical laboratory was not within the array of permissible sanctions that could be imposed without exhaustion of remedies. Petitioner asserts that the case highlights the proposition that tribunals should be loathe to permit imposition of pre-exhaustion administrative sanctions and that, in its case, there is no recourse to Petitioner if its conviction is reversed. Thus, Petitioner infers that his exclusion should be stayed pending resolution of his appeal of his criminal conviction. P. Reply at 1-3. The court's order in *Victor Valley* is simply inapposite to Petitioner's case, as it does not rest on a criminal conviction. Petitioner's exclusion is derivative of an action taken by another fact-finder (its conviction in state court), and is materially different than the cancellation of Medicare

In this case, Congress mandates Petitioner's exclusion based upon the nature of the conviction and that the exclusion occur whether or not Petitioner has an appeal of the underlying conviction pending. Act §§ 1128(a)(2) and 1128(i)(1). Congress has not authorized that exclusion be stayed pending completion of appeals of a criminal conviction. Petitioner's complaint is with Congress not the Secretary, the I.G., or me. I have no authority to resolve Petitioner's perceived "Constitutional" issue. My jurisdiction is limited to the issues that I am authorized to hear, which are whether there is a basis for a petitioner's exclusion and, in the appropriate case, whether the length of the exclusion imposed is reasonable. 42 C.F.R. §§ 1001.2007(a), 1005.4(c)(1); *see Keith Michael Everman, D.C.,* DAB No. 1880 (2003); *Sentinel Medical Laboratories, Inc.,* DAB No. 1762 (2001).

I note, however, that Petitioner has not been deprived of any due process afforded by the Act and regulations. Petitioner received appropriate notice of its exclusion and has been afforded an opportunity to be heard by an ALJ. Furthermore, if Petitioner's criminal conviction is reversed or vacated on appeal, the I.G. must reinstate Petitioner retroactive to the effective date of the exclusion and make retroactive payments for covered services provided during the period of exclusion. 42 C.F.R. § 1001.3005(a)(1) and (b).

III. Conclusion

There is a basis for exclusion and five years is the minimum period of exclusion authorized by law.

/s/
Keith W. Sickendick
Administrative Law Judge

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and Medicaid payments in *Victor Valley*, where the facts had not previously been established in an administrative hearing or other judicial proceeding. *See Thomas Bruce Vest, M.D.*, DAB CR453 (1997).