Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Katherine Elaine Turner, a.k.a.,	)	
Katherine Yeary,	)	Date: November 12, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-451
	)	Decision No. CR2030
The Inspector General.	)	
	)	

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Affirmance of the I.G.'s determination to exclude the Petitioner herein, Katherine Elaine Turner, also known as Katherine Yeary, from participation in Medicare, Medicaid, and all other federal health care programs for a period of three years. The I.G.'s Motion and determination to exclude Petitioner are based on the terms of section 1128(b)(2) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(2). The facts in this case authorize the imposition of a three-year exclusion, and for that reason I grant the I.G.'s Motion for Summary Affirmance.

I. Procedural Background

The Petitioner Katherine Elaine Turner, whose name appears in some official records and some exhibits in this case as Katherine Elaine Yeary, Katherine Yeary, and K. Elaine Yeary, was in 2005 a Licensed Nurse Practitioner and Registered Nurse practicing in the Commonwealth of Virginia. She had been employed by an enterprise called the Virginia Center for Integrative Medicine (VCIM) since May 2004. VCIM participated in the Medicare and Tennessee Medicaid programs. VCIM was owned and operated by a chiropractor named Mark Allen Bradley.

Activities at VCIM became the subject of law-enforcement inquiries, and on December 12, 2005 Petitioner appeared before the Federal Grand Jury sitting for the United States District Court for the Western District of Virginia and testified about certain of those activities.

Petitioner lied to the Federal Grand Jury. Seven months later those lies resulted in her being charged with Obstruction of Justice, in violation of 18 U.S.C. §§ 1512 and 2. That charge was set out in Count Twenty-One of a 23-count Indictment handed up by the Federal Grand Jury on July 18, 2007. The Indictment also charged Petitioner as a co-defendant in one count of Conspiracy to commit Health Care Fraud, Wire Fraud, Mail Fraud, and controlled-substances-related crimes, in violation of 18 U.S.C. § 371. The Indictment charged the chiropractor Bradley with the same count of Conspiracy; one count of Health Care Fraud, in violation of 18 U.S.C. § 1347; 17 counts of using another person's registration number to distribute controlled substances, in violation of 21 U.S.C. § 843(a)(2); and three counts of Obstruction of Justice.

Petitioner and her lawyer negotiated a plea to the Obstruction of Justice charge with the United States Attorney, and on October 1, 2007 the plea-bargain was reduced to writing. Although the date on which she pleaded guilty to Count Twenty-One of the Indictment does not appear in this record, Petitioner appeared with counsel for sentencing on her guilty plea in the United States District Court on March 24, 2008. She was sentenced to a three-year term of probation and was assessed a criminal monetary penalty of $100.00. On motion of the United States, the Conspiracy charge was dismissed.

On April 30, 2009 the I.G. notified Petitioner that she was to be excluded pursuant to the terms of section 1128(b)(2) of the Act for a period of three years. Acting through new counsel, Petitioner timely sought review of the I.G.'s action by letter dated May 5, 2009.

I convened a telephonic prehearing conference on June 30, 2009, pursuant to 42 C.F.R. § 1005.6, in order to discuss the procedures best suited for addressing the issues presented by the case. The parties agreed that the case likely could be decided on written submissions, and by Order of June 30, 2009 I established a schedule for the filing of documents and briefs.

All briefing is now complete, and the record in this case closed on October 5, 2009, under the circumstances contemplated in Paragraph 8 of that Order. Petitioner did not file a Response brief as she was permitted to do by that Order, and failed to announce her intention of not doing so, as she was obliged to do by Paragraph 5(d) of that Order. Her only substantive pleading on the merits remains her August 31, 2009 "Petitioner's Brief in Opposition to the Inspector General's Motion for Summary Affirmance and Brief in Support of Objection to Exclude the Petitioner from Participating in All Federal Healthcare Programs under 1128(B)(2)," that bears on its first page the date July 31, 2009, and which I will hereinafter cite in this abbreviated form: (P. Ans. Br).

The evidentiary record before me contains seven exhibits, six of which have been proffered by the I.G. and marked I.G. Exs. 1-6. Petitioner attempted a proffer of two exhibits, but they were rejected as improperly and incompletely marked, and Petitioner did not resubmit them marked in conformity with CRDP § 9 and Paragraph 5(e) of the Order of June 30, 2009. The I.G. then proffered I.G. Ex. 6, a copy of the first 14 pages of the 20-page document submitted by Petitioner as proposed Petitioner's Exhibit 2. I.G. Ex. 5 is identical to the document submitted by Petitioner as proposed Petitioner's Exhibit 1. Petitioner has not objected to any of the I.G.'s proffered exhibits. In the absence of objection I admit I.G. Exs. 1-6.

The seventh exhibit is marked ALJ Ex. 1, and is made part of the evidentiary record under the following circumstances. As noted above, Petitioner declined properly to mark, paginate, and resubmit her two rejected exhibits. Since I.G. Ex. 5 is identical to proposed Petitioner's Exhibit 1, any potential adverse effect on Petitioner's position here by the rejection of proposed Petitioner's Exhibit 1 is obviated by the admission of I.G. Ex. 5. And although I.G. Ex. 6 contains the first 14 pages of the 22-page document submitted by Petitioner as proposed Petitioner's Exhibit 2, it does not contain the last eight pages of that document, made up of a partial transcript of the sentencing proceeding during which Petitioner made certain representations to which she refers in her brief. Given the nature of her brief and of the argument there set out, it seems prudent to admit pages 15-22 of proposed Petitioner's Exhibit 2 as ALJ Ex. 1.

Petitioner is represented here by Terry G. Kilgore, Esquire, of Gate City, Virginia.

II. Issues

The issues before me are limited to those noted at 42 C.F.R. § 1001.2007(a)(1). In the context of this record they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(2) of the Act; and

2. Whether the three-year length of the period of exclusion is unreasonable.

The controlling authorities require that both issues be resolved in favor of the I.G.'s position. Section 1128(b)(2) of the Act authorizes Petitioner's exclusion. A three-year period of exclusion is the prescribed period established by section 1128(c)(3)(D) of the Act, 42 U.S.C. § 1320a-7(c)(3)(D). It is therefore reasonable as a matter of law.

III. Controlling Statutes and Regulations

Section 1128(b)(2) of the Act, 42 U.S.C. § 1320a-7(b)(2), authorizes the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "[a]ny individual or entity convicted, under Federal or State law, in connection with the interference with or obstruction of any investigation into any criminal offense described in [section 1128(b)(1) or section 1128(a) of the Act]." The terms of section 1128(b)(2) are restated in similar regulatory language at 42 C.F.R. § 1001.301(a).

Criminal offenses described in section 1128(a) of the Act include those related to the delivery of an item or service under the Medicare or State health care programs, those consisting of felony offenses in connection with health care fraud or relating to controlled-substance laws committed after August 21, 1996, and those relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

Criminal offenses described in section 1128(b)(1) of the Act include those committed after August 21, 1996, and relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any federal, state, or local government agency.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court," (section 1128(i)(1) of the Act); "when there has been a finding of guilt against the individual . . . by a Federal . . . court," (section 1128(i)(2) of the Act); or "when a plea of guilty . . . by the individual . . . has been accepted by a Federal . . . court," (section 1128(i)(3) of the Act, 42 U.S.C. §§ 1320a-7(i)(1)-(3)). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based in section 1128(b)(2) of the Act is discretionary. If the I.G. exercises that discretion and proceeds with the sanction, then the prescribed period of exclusion to be imposed under section 1128(b)(2) of the Act is three years unless the I.G. "determines in accordance with published regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances." Act, section 1128(c)(3)(D); 42 U.S.C. § 1320a-7(c)(3)(D). The regulatory language of 42 C.F.R. § 1001.301(b)(1) affirms the statutory provision. In this case the I.G. does not seek to enhance the prescribed three-year period by reliance on any of the aggravating factors listed at 42 C.F.R. § 1001.301(b)(2), and Petitioner has made no attempt to demonstrate any of the factors set out at 42 C.F.R. § 1001.301(b)(3) that would warrant its reduction.

IV. Findings and Conclusions

I find and conclude:

1. On a date not established by this record, in the United States District Court for the Western District of Virginia, Petitioner Katherine Elaine Turner, also known as Katherine Yeary, pleaded guilty to one count of Obstruction of Justice, in violation of 18 U.S.C. §§ 1512 and 2. I.G. Exs. 4, 5, 6.

2. Final adjudication of guilt, judgment of conviction, and sentencing based on that plea of guilty were imposed on Petitioner in the United States District Court for the Western District of Virginia on March 24, 2008. I.G. Ex. 5, 6.

3. On April 30, 2009, the I.G. notified Petitioner that she was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of three years, based on the authority set out in section 1128(b)(2) of the Social Security Act, 42 U.S.C. § 1320a-7b(2). I.G. Ex. 1.

4. The adjudication of guilt, judgment of conviction, and sentence based on Petitioner's violation of 18 U.S.C. §§ 1512 and 2 constitute a "conviction" in connection with the interference with or obstruction of an investigation into a criminal offense described in section 1128(b)(1) or section 1128(a) of the Act, within the meaning of sections 1128(b)(2) and 1128(i)(1), (2), and (3) of the Act. I.G. Exs. 3, 4, 5, 6.

5. Because of her conviction, the I.G. was authorized to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for a period of three years, pursuant to sections 1128(b)(2) and 1128(c)(3)(D) of the Act.

6. The length of Petitioner's exclusion is the term prescribed by statute and is therefore reasonable as a matter of law. I.G. Ex. 1; Findings 1-5, above.

7. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The two essential elements necessary to support an exclusion based on section 1128(b)(2) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the conviction must have been in connection with the interference with or obstruction of an investigation into any criminal offense described in section 1128(b)(1) or 1128(a) of the Act. *Philip J. Bisig*, DAB CR1288 (2005); *Nazirul Quayam, D.D.S.*, DAB CR408 (1995).

Petitioner admits her felony conviction and thereby concedes the existence of the first essential element. P. Ans. Br. at 4. Independent and objective proof of her conviction and sentencing for violating 18 U.S.C. §§ 1512 and 2 appears in I.G. Ex. 5, the United States District Court's Judgment in a Criminal Case, and in I.G. Ex. 6, the transcript of Petitioner's sentencing proceedings.

It is over the second essential element that Petitioner mounts her defense, but her argument is not clearly articulated. She appears to challenge the connection between the investigation she obstructed by lying to the Federal Grand Jury and the crimes identified in sections 1128(a) and 1128(b)(1) of the Act. Here, in her counsel's own words, is the sum of her argument on that point:

> 1. The IG's exclusion of the Petitioner is not supported by the evidence. The Petitioner pled guilty to one Count of Obstruction of Justice due to her not being forthright about her relationship with Dr. Bradley. The Obstruction of Justice charge is the only charge for which the Petitioner received a conviction. The Petitioner admits that she was convicted of a crime. However, the Petitioner does object to the IG's statement that she participated in the defrauding of Federal Health program.
>
> The Appeals Board of this Court In Re Tamara Brown has stated "that a nexus and common sense connection must exist between the offense in which the Petitioner plead guilty and of which she was found guilty....in a delivery of an item or service under a state healthcare program." [See In Re Tamara Brown DAB CR1799 at 5.] In that case, Ms. Brown pled guilty to attempting Medicare, Medicaid fraud Id. at 3. There, the Court there found that there was a close nexus to the delivery of healthcare services. Here, the IG cannot make such a case. It is clear from the record that the Petitioner pled guilty as a result of her not being forthright with the authorities about her relationship with Dr. Bradley. Therefore, your Petitioner would conclude that the IG's exclusion is not legally supported. The evidence in the record clearly starts that she was convicted of Obstruction of Justice and not convicted of Obstruction to the degree the IG concludes. Therefore, the IG's reliance heavily upon other issues involving the case was not supported by the clear evidence in the Petitioner's case. As such, the IG was not

> authorized to excluded the Petitioner under Section 1128(b)(2) of the Act.

P. Ans. Br. at 4.

It is true that the language Petitioner quotes appears in *Tamara Brown*, DAB CR1799 (2008), *aff'd*, DAB No. 2195 (2008). It may be noted that *Tamara Brown* dealt with an exclusion based on section 1128(a)(1) of the Act. Section 1128(a)(1) requires that the "nexus and common sense connection" be shown in the context of the statutory phrase "related to." Section 1128(b)(2) requires that the nexus be shown in the context of the statutory language "in connection with." But there is no material significance in the difference between those terms: the nature of the "nexus and common sense connection" required to be shown is the same. *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993).

Petitioner's argument seems to be that there is no apparent nexus or common sense connection between her lies to the grand jury and her commission of an actual substantive crime – such as fraud – against a protected health program. That argument might be very difficult to make with any success if it were material. But Petitioner simply misapprehends the pole to which the nexus or common sense connection must be shown to link her conduct. Here, that pole is not an actual substantive criminal act forbidden by sections 1128(a) and 1128(b)(1). Section 1128(b)(2) does not require an individual to have been involved in the wrongdoing being investigated for that individual to be found to have interfered with or obstructed that investigation. *Nazirul Quayam, D.D.S.*, DAB CR408.

The nexus or connection required to be shown in an exclusion based on section 1128(b)(2) must be between the investigation obstructed or interfered with and the crimes identified in sections 1128(a) and 1128(b)(1). *Quayam*, DAB CR408. Here, the specific nexus or connection the I.G. is required to establish must be between the lies Petitioner told the Federal Grand Jury – the lies that violated 18 U.S.C. § 1512 – and the Federal Grand Jury's investigation into whether the activities of VCIM, the chiropractor Bradley, and Petitioner herself amounted to crimes identified in sections 1128(a) and 1128(b)(1) of the Act.

Was the Federal Grand Jury investigating crimes identified in sections 1128(a) and 1128(b)(1) when Petitioner appeared before it on December 12, 2005, and lied about whether she had left presigned prescriptions at the VCIM office, whether she had been on the VCIM premises providing medical services at certain times, and whether the chiropractor Bradley had given out prescriptions? *See* I.G. Ex. 3, at 14. The answer is readily found in the Federal Grand Jury's own words: the Indictment's first count describes a 39-month conspiracy in fine detail, but the overall scheme at VCIM was to

send fraudulent bills to Medicare and Medicaid for controlled-substance prescriptions issued by persons not authorized or licensed to do so, and to conduct and conceal that illegal activity by preparing and using falsely-completed prescription forms and other bogus documentation. I.G. Ex. 3, at 1-10.

The Federal Grand Jury identified the federal statutes the conspirators intended to violate. Those statutes included 18 U.S.C. § 1347, Health Care Fraud, by billing Medicare and Medicaid for services performed by persons not licensed or authorized to perform them, and performed in a manner not allowed by those programs; 18 U.S.C. § 1343, Wire Fraud, by the electronic transmission of false documents; 18 U.S.C. § 1341, Mail Fraud, by the use of the mails to submit false documents; and 21 U.S.C. § 843(a)(2), by the improper distribution of controlled substances through the criminal abuse of a Drug Enforcement Administration registration number. I.G. Ex. 3, at 6. As the I.G. correctly points out (I.G. Br.-in-Ch. at 10-12), every one of those statutes forbids a crime within the ambit of sections 1128(a)(1), 1128(a)(3), 1128(a)(4), or 1128(b)(1) of the Act.

When Petitioner appeared before it and lied about the prescription forms and documents (I.G. Ex. 6, at 4), the Federal Grand Jury was investigating precisely the crimes mentioned in those sections of the Act, and had been doing so since at least June 29, 2005, the date on which the chiropractor Bradley procured another witness's false testimony before that body. I.G. Ex. 3, at 10, 14. Thus a clear nexus and an obvious common sense connection exists in this case between the investigation Petitioner obstructed by her lies and many of the crimes identified in sections 1128(a) and 1128(b)(1) of the Act. With proof of that nexus, the I.G. has established the second essential element.

Petitioner notes that the Virginia Board of Nursing has reinstated her license to practice subject to certain terms and conditions, and has asserted that the proposed exclusion "basically amounts to a death sentence in the field of healthcare" and is therefore unreasonable. P. Ans. Br. at 2. She supports this assertion by correctly pointing out that the proposed exclusion is "longer than her probation that she received from the Federal Court," and by then incorrectly complaining that it "inhibits her ability to practice as a nurse." P. Ans. Br. at 5.

The only inhibition on Petitioner's nursing practice at stake here is the inhibition on her right to practice in protected federal healthcare programs. The protection of those programs and their vulnerable beneficiaries from untrustworthy persons is a crucial goal of the exclusion remedy. Petitioner, who has admitted deliberately obstructing and interfering with an investigation into widespread abuse of those programs and their beneficiaries, can hardly be heard to complain that for three years she must stay away from them. Petitioner has made no attempt to point out any of the mitigating factors listed at 42 C.F.R. § 1001.301(b)(3), and I have found nothing suggesting their presence on my own review of the record. The three-year period of exclusion before me is the

period prescribed by statute and is reasonable as a matter of law. *Philip J. Bisig*, DAB CR1288; *Nazirul Quayam, D.D.S.*, DAB CR408.[1]

Resolution of a case by summary disposition is warranted when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. The material facts in this case are undisputed, clear, and unambiguous. They support summary disposition as a matter of law. This Decision issues accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Katherine Elaine Turner, also known as Katherine Yeary, from participation in Medicare, Medicaid, and all other federal health care programs for a period of three years, pursuant to the terms of section 1128(b)(2) of the Act, 42 U.S.C. § 1320a-7(b)(2), is thereby affirmed.

/s/
Richard J. Smith
Administrative Law Judge

[1]This discussion avoids characterizing the three-year period as either a "benchmark" or a "mandatory minimum." See *Detra Tate Fairley*, DAB CR1349**,** at 9-10 (2005).