Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Wanda K. Lowther,

Petitioner

v.

The Inspector General.

Docket No. C-10-516

Decision No. CR2192

Date: July 22, 2010

DECISION

This matter is before me in review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Wanda K. Lowther from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s determination to exclude Petitioner is based on the terms of section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). As the facts of this case mandate the imposition of a five-year exclusion, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner Wanda K. Lowther was a registered nurse in the state of Ohio. In 2007, Petitioner worked at Pebble Creek Nursing Home and, in 2008, at Ascera Care Hospice. On July 11, 2008, Petitioner was charged with three felony counts of theft of drugs in violation of OHIO REVISED CODE § 2913.02(A)(1) and one felony count of aggravated possession of drugs in violation of OHIO REVISED CODE § 2925.11(A)(C)(1). The four count indictment contained the following allegations: that on January 2, 2008, Petitioner stole the drug Roxinol from Ascera Care Hospice; that on May 19, 2007, Petitioner stole the drug Percocet from Pebble Creek Nursing Home; that between October and December 2007, Petitioner stole Roxinol from Pebble Creek Nursing Home; and that on

January 2, 2008, Petitioner knowingly obtained, possessed, or used the drug Roxinol, committing the crime of aggravated possession of drugs.

On August 4, 2008, Petitioner filed a Motion for Intervention in Lieu of Conviction, which the Summit County Court of Common Pleas accepted on August 25, 2008. In granting Petitioner's Motion, the County Court accepted Petitioner's guilty pleas to all counts of the indictment.

As required by the terms of section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. On January 29, 2010, the I.G. notified Petitioner that she would be excluded pursuant to the terms of section 1128(a)(3) of the Act for the mandatory minimum period of five years.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action by letter dated February 24, 2010. I convened a telephonic prehearing conference on April 2, 2010, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing those issues. By order of April 2, 2010, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case closed on June 16, 2010.

The evidentiary record on which I decide the issues before me comprises nine exhibits. The I.G. proffered six exhibits marked I.G. Exhibits 1-6 (I.G. Exs. 1-6). Petitioner proffered three unmarked exhibits. I have designated them Petitioner's Exhibits 1-3 (P. Exs. 1-3). All proffered exhibits are admitted without objection.

II. Issues

The issues before me are set out at 42 C.F.R. § 1001.2007(a)(1). In the specific context of the record, they are:

1. Whether the I.G. had a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(3) of the Act; and

2. Whether the proposed five-year period of exclusion is unreasonable.

The long-settled law of this forum entitles the I.G. to summary judgment on both issues. Section 1128(a)(3) of the Act mandates Petitioner's exclusion, for her predicate conviction has been established. Petitioner pleaded guilty to all counts, which qualifies as a conviction under 42 U.S.C. § 1320a-7(i)(3) and (4). A five year period of exclusion is reasonable as a matter of law because it is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B).

III. Controlling Statutes and Regulations

Section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "[a]ny individual or entity that has been convicted of 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 1128(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 related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." The regulation implementing section 1128(a)(3) appears at 42 C.F.R. § 1001.101(c)(1).

Under the Act, a person is "convicted" within the meaning of section 1128(i) if:

(1) a judgment of conviction has been entered against the individual by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;

(2) when there has been a finding of guilt against the individual by a Federal, State, or local court;

(3) when a plea of guilty or nolo contendere by the individual has been accepted by a Federal, State, or local court; or

(4) 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. 42 U.S.C. § 1320a-7(i).

An exclusion based on section 1128(a)(3) is mandatory: the I.G. must impose it for a minimum period of five years. Act, section 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

The Act provides that an exclusion pursuant to section 1128(a) "shall be effective at such time and upon such reasonable notice to the public and to the individual or entity excluded as may be specified by regulations . . . ." Act § 1128(c)(1). Congress granted the Secretary essentially unfettered discretion through section 1128(c)(1) to establish the effective date of exclusion by regulation. The regulation provides that an exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b).

IV. Findings and Conclusions

I find and conclude the following:

1. After Petitioner pleaded guilty to all four counts in the indictment on August 25, 2008, the County Court stayed all criminal proceedings against Petitioner and placed her under the control of the Adult Probation Department and the Summit County Psycho-Diagnostic Clinic. I.G. Ex. 3, at 1.

2. The accepted guilty pleas and Petitioner's entrance into a treatment program where judgment of conviction was withheld constitute a "conviction" within the meaning of sections 1128(a)(3) and 1128(i)(3) and (4) of the Act, and 42 C.F.R. § 1001.2.

3. The felony criminal offenses to which Petitioner pleaded guilty were in connection with the delivery of a health care item or service and occurred after August 21, 1996. I.G. Ex. 2.

4. On January 29, 2010, 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 five years, based on the authority set out in section 1128(a)(3) of the Act. I.G. Ex. 1.

5. Acting *pro se*, Petitioner perfected her appeal from the I.G.'s action by filing a timely hearing request on February 24, 2010.

6. By reason of Petitioner's conviction, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

7. By reason of her conviction, Petitioner was subject to, and the I.G. was required to impose, the mandatory minimum five-year period of exclusion from Medicare, Medicaid, and all other federal health care programs. Section 1128(c)(3)(B) of the Act; 42 C.F.R. § 1001.102(a).

8. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, it is therefore not unreasonable. Section 1128(c)(3)(B) of the Act; 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

9. Although the County Court accepted Petitioner's guilty pleas on August 25, 2008, the I.G. has broad discretion to impose the effective date of the exclusion and the effective date of 20 days from the January 29, 2010 notice of exclusion is within that broad discretion. Act § 1128(c)(1); 42 C.F.R. § 1001.2002(b).

10. There are no disputed issues of material fact before me and summary disposition on the written submissions is appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, *or* the felony offense must have been with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the felonious conduct must have occurred after August 21, 1996. *Andrew D. Goddard*, DAB No. 2032 (2006); *Kenneth M. Behr*, DAB No. 1997 (2005); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Jeremy Robinson*, DAB No. 1905 (2004); *Breton Lee Morgan, M.D.*, DAB CR1913 (2009); *Wendi Mueller*, DAB CR1478 (2006); *Theresa A. Bass*, DAB CR1397 (2006); *Michael Patrick Fryman*, DAB CR1261 (2004); *Golden G. Higgwe, D.P.M.*, DAB CR1229 (2004); *Thomas A. Oswald, R.Ph.*, DAB CR1216 (2004); *Katherine Marie Nielsen*, DAB CR1181 (2004).

Petitioner does not deny that she pleaded guilty to three counts of felony theft of drugs and one count of felony aggravated possession of drugs. I.G. Exs. 2 and 3. Petitioner does not dispute that the felony offenses were based on conduct relating to theft in connection with the delivery of a health care item or service or that the felonious conduct occurred after August 21, 1996. The record refers to dates in May 2007 and January, October and December 2008 for the four felony convictions, and all are after August 21, 1996. The second, third, and fourth essential elements are thus established without the need for further discussion.

A. Petitioner was convicted as conviction is defined in the Act.

Petitioner contests the first element in disputing the I.G.'s use of her guilty pleas as "convictions." I.G. Ex. 3 shows that on August 25, 2008, Petitioner appeared with counsel in the Summit County Court of Common Pleas and pleaded guilty to all four felony charges. The County Court found that Petitioner's drug dependence was a factor leading to Petitioner's criminal activity and ordered Petitioner to attend a controlled and supervised rehabilitation program in lieu of conviction pursuant to OHIO REV. CODE ANN. § 2951.041.

The Act defines "conviction" as including instances "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court" and "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." Act, section 1128(i)(3) and (4), 42 U.S.C. § 1320a-7(i). These definitions are repeated at 42 C.F.R. § 1001.2.

Under Ohio law, when a court finds an offender eligible for intervention in lieu of conviction and grants the offender's request:

> . . . the court shall accept the offender's plea of guilty and waiver of the defendant's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the offender. . . the court may then stall all criminal proceedings and order the offender to comply with all terms and conditions imposed by the court . . .Successful completion of the intervention plan and period of abstinence under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime . . . . OHIO REV. CODE ANN. § 2951.041(C) and (E).

Although the language of OHIO REV. CODE ANN. § 2951.041 suggests that an offender's guilty pleas in exchange for an intervention in lieu of conviction will not qualify as "conviction[s]," the plain language of the Act reveals that Ohio's intervention in lieu of conviction program fits precisely within the Act's definition of conviction. Congress amended the Act to specifically encompass the alternative programs devised by several states within the definition of conviction, including first offenders and other arrangements where judgment of conviction has been withheld. First, in this case, the Ohio County Court had to accept Petitioner's guilty pleas in order to enroll her in the intervention program, which places her situation within section 1128(i)(3) of the Act. *Michael J. O'Brien, D.O.*, DAB CR1150, at 5 (2004). Second, Ohio's intervention in lieu of conviction clearly qualifies as an "other arrangement or program where judgment of conviction has been withheld" under section 1128(i)(4) because Petitioner's failure to comply with the requirements of the statute would result in conviction. Under the plain language of the Act, Petitioner was "convicted."

Exclusion from all federal health care programs is governed by federal law based on the Supremacy Clause of the United States Constitution. U.S. Const., art. VI, cl. 2. A state cannot bar enforcement of a federal law in contravention of the Supremacy Clause. Thus, the Act's definition of "conviction" trumps Ohio's statute defining "convictions" under its intervention in lieu of conviction program.

B. Petitioner's five-year period of exclusion is reasonable as a matter of law.

The five-year period of exclusion proposed in this case is the absolute minimum required by section 1128(c)(3)(B) of the Act. As a matter of law, it is not unreasonable, and

neither the Board nor I can reduce it. 42 C.F.R. § 1001.2007(a)(2); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

C. The I.G. has broad discretion to set the effective date of the exclusion.

Petitioner argues that her five-year exclusion should be applied retroactively to the day of the actual guilty plea. In this case, Petitioner pleaded guilty to four felony counts on August 25, 2008 and the I.G. notified Petitioner of her exclusion on January 29, 2010.

The Act provides that an exclusion pursuant to section 1128(a) "shall be effective at such time and upon such reasonable notice to the public and to the individual or entity excluded as may be specified by regulations . . . ." Act § 1128(c)(1). Section 1128(c)(1) of the Act provides that an exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b).

Under section 1128(a) of the Act and 42 C.F.R. § 1001.2002(b), the I.G. has broad discretion to impose an exclusion when it chooses. The Secretary's regulations do not give me discretion to change the effective date of Petitioner's exclusion and I may not refuse to follow the Secretary's regulations. 42 C.F.R. § 1005.4(c)(1); *Thomas Edward Musial*, DAB No. 1991 (2005); *Aiad Saman*, DAB No. CR2050 (2009). Thus, the I.G.'s imposition of Petitioner's exclusion 18 months after her guilty pleas and "conviction" is valid.

Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992). 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. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law. This Decision issues accordingly.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Wanda Lowther from participation in Medicare, Medicaid, and all other federal health care programs for a term of five years, pursuant to the terms of section 1128(a)(3) of the Act, is sustained.

/s/
Richard J. Smith
Administrative Law Judge