Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Michelle Bott-Graham, IDOC #69420,
(O.I. File Number 9-09-40490-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-841

Decision No. CR2306

Date: January 10, 2011

DECISION

Petitioner, Michelle Bott-Graham, is appealing a determination by the Inspector General (I.G.) to exclude her from participating in Medicare, Medicaid, and all federal health care programs for a period of 30 years. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(2) of the Social Security Act (Act) and that the 30-year exclusion imposed by the I.G. against Petitioner is reasonable.

I. Procedural Background

By letter dated June 30, 2010, the I.G. notified Petitioner that she was being excluded from participating in Medicare, Medicaid, and all federal health care programs for a minimum period of 30 years. The I.G. advised Petitioner that her exclusion was imposed under section 1128(a)(2) of the Act and was due to her conviction in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock (State Court), of a criminal offense related to the neglect or abuse of patients in connection with the delivery of a health care item or service. Although the minimum mandatory period of exclusion is five years, the I.G. informed Petitioner that she was being excluded for 30 years due to the presence of aggravating factors under 42 C.F.R. § 1001.102. The I.G.

also informed Petitioner that due to the age of her conviction the I.G. did not establish an exclusion period as long as the aggravating factors would otherwise support. Petitioner requested a hearing pursuant to 42 C.F.R. § 1005.2 on July 7, 2010.

I held a pre-hearing conference by telephone on August 17, 2010. Petitioner, who is currently incarcerated, appeared *pro se*. I informed Petitioner that she had the right to retain counsel but that I could not appoint counsel for her. Petitioner did not retain counsel during the course of this proceeding. I also informed Petitioner that based on my review of the file it appeared likely that the issues in the case could be addressed in summary fashion in the context of a motion for summary disposition. I informed the parties that if any issues could not be resolved in summary fashion I would schedule an evidentiary hearing to address them.

The I.G. filed a motion for summary disposition (I.G. Br.), accompanied by 17 exhibits (I.G. Exs. 1-17).[1] Petitioner filed an answer brief (P. Br.). The I.G. filed a reply (I.G. Reply), and Petitioner filed a final response (P. Response), accompanied by two exhibits (P. Exs. 1 and 2). I receive into evidence I.G. Exs. 1-17 and P. Exs. 1 and 2.

II. Issues

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

a. 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(a)(2) of the Act; and

b. The length of the proposed period of exclusion is unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(2) of the Act mandates that an individual or entity convicted of "a criminal offense relating to the neglect or abuse of patients in connection with the delivery of a health care item or service" be excluded from participating in federal health care programs. Section 1128(c)(3)(B) requires that the minimum period of exclusion under section 1128(a)(2) is five years. Aggravating factors may lengthen the period of exclusion but mitigating factors can only be considered to shorten an exclusion when the

[1] The I.G. also filed a number of attachments (Attachments A-O, P.1-P.4, Q, R.1-R.4, and S-X) consisting of copies of pertinent provisions of the Act and regulations and copies of decisions. The I.G's professionalism in making these things available to the incarcerated Petitioner *pro se* is noted with appreciation. Although I note them here, they are not exhibits in the case.

exclusion imposed is for a period longer than five years. 42 C.F.R. § 1001.102. Section 1128(i) of the Act considers an individual to have been convicted when: (1) a judgment of conviction has been entered against the individual in a federal, state, or local court, whether an appeal is pending or the record of the conviction has been expunged; (2) a court finds an individual guilty; (3) a court accepts an individual's plea of guilty or *nolo contendere* (no contest); or (4) an individual has entered into an arrangement or program where judgment of conviction is withheld. Act, section 1128(i)(1)-(4).

The regulations governing my resolution of this case, set forth at 42 C.F.R. Part 1005, do not specify summary disposition procedures, but summary disposition is explicitly authorized by the terms of 42 C.F.R. § 1005.4(b)(12), and this forum looks to Fed. R. Civ. P. 56 for guidance in applying that regulation.

Summary disposition is appropriate in an exclusion case 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. *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *David A. Barrett*, DAB No. 1461 (1994); *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367 (1992); *Catherine L. Dodd, R.N.*, DAB No. 1345 (1992); *John W. Foderick, M.D.*, DAB No. 1125 (1990). All the facts and the inferences reasonably to be drawn from those facts must be viewed in the light most favorable to the nonmoving party. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3rd Cir. 1986); *Brightview Care Center*, DAB No. 2132 (2007); *Madison Health Care, Inc.*, DAB No. 1927, at 5-7 (2004). When the undisputed material facts of a case support summary disposition, there is no need for a full evidentiary hearing, and neither party has the right to one. *Surabhan Ratanasen, M.D.*, DAB No. 1138 (1990); *John W. Foderick, M.D.*, DAB No. 1125.

In opposing a properly-supported motion for summary disposition as described by Fed. R. Civ. P. 56, the nonmoving party must show that there are material facts that remain in dispute, and that those facts either affect the proponent's *prima facie* case or might establish a defense. *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Medical Center*, DAB No. 1628 (1997). It is insufficient for the nonmoving party to rely upon mere allegations or denials to defeat the motion and proceed to hearing. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

IV. Discussion

My findings of fact and conclusions of law are set forth below in bold. My analysis follows each finding and conclusion.

The essential elements necessary to support an exclusion based on section 1128(a)(2) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the criminal offense must have been related to the neglect or abuse of a

patient; and (3) the patient neglect or abuse to which the individual's criminal offense is related must have occurred in connection with the delivery of a health care item or service.

1. Petitioner was convicted of a criminal offense related to the neglect or abuse of a patient in connection with the delivery of a health care item or service.

a. Petitioner was convicted of a criminal offense.

The first essential element, the fact of Petitioner's conviction, is conclusively established by the records in evidence. On October 12, 2006, Petitioner entered a plea of guilty in State Court to one count of Involuntary Manslaughter, IDAHO CODE ANN. §§ 18-4006(2) and 18-4007(2) and one count of Injury to Child, IDAHO CODE ANN. § 18-1501(1), both felonies. The Court accepted Petitioner's guilty plea. I.G. Exs. 1, 2. Petitioner's guilty plea and the Court's acceptance of that plea constitute a judgment of conviction against Petitioner and also constitute conviction of a criminal offense for purposes of the Act. Act, section 1128(i)(1), (3). The Court sentenced Petitioner to a fixed ten-year period of confinement for involuntary manslaughter and a fixed one-year period of confinement with a subsequent indeterminate nine-year period of confinement for injury to a child, the sentences to run consecutively. I.G. Ex. 2.

Petitioner does not assert that she was not convicted of a criminal offense. She argues only that she is appealing her conviction. Specifically, Petitioner argues that she is appealing her conviction because she did not enter into her plea freely and voluntarily, despite the questionnaire she answered before pleading guilty in which she stated that she was entering her plea freely and voluntarily (CMS Ex. 1, at 1-2); because she was under duress at the time she made her plea; because she received ineffective assistance of counsel; because the charges against her were pressed in retaliation for legislation she helped enact; and because previously-uninvestigated and mitigating evidence has come to light. P. Br. at 3-4. Petitioner's argument is unavailing. Petitioner's appeal of her State Court conviction does not negate the existence of her conviction. The Act provides that when there has been a judgment of conviction an individual is considered to be convicted "regardless of whether there is an appeal pending . . . ." Act, section 1128(i). Furthermore, Petitioner's arguments constitute a collateral attack on her conviction, which I am precluded by law from considering. 42 C.F.R. § 1001.2007(d). If Petitioner's conviction is overturned on appeal the regulations provide for reinstatement. 42 C.F.R. § 1001.3005(a)(1).

b. Petitioner's conviction was for a criminal offense relating to neglect or abuse of a patient.

c. Petitioner's conviction relating to neglect or abuse of a patient occurred in connection with the delivery of a health care item or service.

The second and third essential elements are established by the documents of record and Petitioner's admissions in her briefs.

Petitioner does not dispute that on November 29, 2005, she took a two-year-old autistic child, CH, from his day-care center to her home. After she returned him to his day-care center CH was found injured and unresponsive, was hospitalized, and died as a result of his injuries. P. Br. at 2-3. Petitioner does not dispute that her convictions for Involuntary Manslaughter and Injury to Child relate to her care of CH on that day. Instead, Petitioner argues that her conviction was not related to the abuse or neglect of a patient and did not occur in connection with the delivery of a health care item or service because CH was not a patient and she was not providing health care services to him.

Petitioner was a professional counselor prior to voluntarily surrendering her license in 2003.[2] At the time of the incident leading to her conviction Petitioner remained unlicensed. In support of her argument that CH was not a patient, Petitioner asserts that CH's day-care center introduced CH's mother to her and that CH's mother asked her to treat CH for behavioral problems. Petitioner states she informed CH's mother that she was unlicensed and unable to treat anyone. According to Petitioner, CH's mother then asked her to spend time babysitting CH and to suggest where the family could seek treatment for CH's behavioral problems. Petitioner states she agreed to babysit for CH and encouraged CH's mother to seek treatment for CH's behavioral problems from a qualified professional. During one of the babysitting sessions Petitioner admits CH sustained "what appeared to be a minor bump to the head." Petitioner states that CH fell asleep several hours later and she returned him to his day-care center. She admits CH later fell into a coma and was removed from life support at the urging of his parents. P. Br. at 2-3.

Petitioner asserts that she has never had the opportunity to clarify the nature of the relationship between herself, CH, and CH's mother. Petitioner admits she has no documentation to prove the relationship was not that of a provider of counseling services

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[2] The record reflects that Petitioner voluntarily surrendered her professional counselor's license. As a result, on February 4, 2003, the Idaho State Licensing Board of Professional Counselors and Marriage & Family Therapists (Idaho Board) indefinitely suspended her license. I.G. Ex. 5, at 5. Petitioner admits that her license to practice as a counselor and behavioral therapist was suspended in 2003 because of her addiction to pain pills and narcotics following an injury, and admits that she did not hold such a license in November 2005. P. Br. at 2.

and the patient or client of that provider because in the absence of a "client-provider" relationship there would be no such documentation. P. Br. at 3. Petitioner argues that three individuals referenced by the I.G. who made statements during the investigation of the incident that Petitioner was "working" with CH are wrong about the nature of her relationship with CH. P. Response at 1. The individuals referenced by the I.G. are CH's mother (HF) and two employees of the day-care center (SB and BD). I.G. Reply at 2-3; I.G. Ex. 6, at 1, 3; I.G. Ex. 7, at 3. Petitioner argues that CH's mother HF had a vested interest in falsely portraying such a relationship in order to pursue a civil damages case, and that SB and BD made certain assumptions "in light of the situation, [CH's] behaviors, the Petitioner's background and [HF's] claims." P. Response at 1. Petitioner also argues that the I.G. should not have relied on the Idaho Board's finding that CH was her patient because the Board made incorrect assumptions that Petitioner has been unable to challenge. P. Response at 1; I.G. Reply at 2-4, citing I.G. Ex. 5.

At first blush, Petitioner's argument that the relationship between herself and CH did not constitute a patient-or-client relationship might suggest the existence of a genuine dispute as to a material fact, and that summary disposition is for that reason precluded on this record. However, Petitioner's mere denials or allegations of fact, in the complete absence of supporting evidence, lead me to conclude that summary disposition is appropriate in this case.

I find that CH was Petitioner's patient or client. In deciding whether CH was Petitioner's patient or client, I may rely on evidence extrinsic to the court record of her conviction to determine the circumstances of the underlying offense. *Emem Dominic Ukpong,* DAB No. 2220 (2008). Specifically, here I rely on the Idaho Board's findings regarding their relationship, as the Board is in the best position to determine what constitutes practicing as a licensed counselor in Idaho. In its April 3, 2008 Final Order revoking Petitioner's license as a professional counselor, the Idaho Board determined that Petitioner was practicing counseling when CH was injured. I.G. Exs. 4, 5. Petitioner did not contest the Board's action. Although Petitioner now argues that she did not have the resources to do so, Petitioner is precluded from collaterally attacking the Board's determination. 42 C.F.R. § 1001.2007(d). As Petitioner was practicing counseling, I also find that her abuse of her patient CH occurred in connection with the delivery of a health care service.

2. The length of Petitioner's exclusion is reasonable.

The I.G. determined that four aggravating factors exist in this case justifying the 30-year period of exclusion imposed. They include that: (1) the acts resulting in Petitioner's conviction had a significant adverse physical impact on an individual, in that Petitioner's actions resulted in CH's death; (2) her sentence included a lengthy period of incarceration; (3) she had a prior administrative sanction record, in that in 2003 the Idaho Board suspended her license as a professional counselor; and (4) the Idaho Board revoked her license in 2008 based on her guilty plea for involuntary manslaughter, the

same offense which formed a basis for imposition of her exclusion. I.G. Ex. 15, at 2; 42 C.F.R. §§ 1001.102(b)(3), (5), (6), (9). I find each of these aggravating factors to exist. Finding 1.

Petitioner argues that the 30-year length of her exclusion is unreasonable and that if I find that the I.G. is authorized to exclude her I should not exclude her for any period greater than ten years. Petitioner argues specifically that: (1) her conviction resulted from a series of circumstances in which there was no "ill-will or intentional perpetration" and that she is "regretful, sad and repentant" for failing CH; (2) her prior administrative sanction record was due to her addiction to pain pills following injury from a physical attack by a patient, not due to malfeasance, neglect or abuse of a client; (3) she has an established record of providing valuable services to children with autism and their families, and she has a highly effective subset of skills critical to the effective intervention and positive prognosis of individuals with autism; (4) the Idaho Board action revoking her license was based on incorrect assumptions and Petitioner did not have the necessary resources to contest those assumptions[3] and she has never been subject to any other adverse action by a state regulatory agency for neglecting or abusing a client or other person; (5) there was no financial loss to Medicare or any other federal, state or local government program due to the acts resulting in her conviction; and (6) Petitioner is attempting to persuade appropriate law enforcement officials to investigate additional cases of fraud and abuse relating to the case. P. Br. at 1-2, 4-5; P. Response at 2. Petitioner's arguments are unavailing.

The regulations require that only certain factors may be considered to reduce an exclusion imposed under section 1128(a)(2) of the Act to a period of not less than five years where the exclusion imposed is for more than five years. These factors are found at 42 C.F.R. § 1001.102 and include where: (1) an individual is convicted of three or fewer misdemeanor offenses and the resulting financial loss to Medicare or another federal, state or local government health care program is less than $1,500 (42 C.F.R. § 1001.102(c)(1)); (2) the record in the criminal proceedings, including sentencing documents, demonstrates that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability (42 C.F.R. § 1001.102(c)(2)); or (3) the individual's cooperation with federal or state officials resulted in others being convicted or excluded from Medicare, Medicaid or another federal health care program; additional cases being investigated or reports being issued by an appropriate law enforcement agency identifying program vulnerabilities or weaknesses; or imposition against another individual of a civil money penalty (42 C.F.R. § 1001.102(c)(3)(i)-(iii)).

[3] As discussed above, I do not address this issue as it is a collateral attack on the Idaho Board proceeding. However, I note that despite Petitioner's lack of resources she managed to appeal her conviction in this forum.

Petitioner was convicted of felonies, not misdemeanors, and so whether there was a loss to government health care programs is irrelevant, and Petitioner did not argue that the State Court found she had a mental, emotional or physical condition which reduced her culpability. Thus the mitigating factors at 42 C.F.R. § 1001.102(c)(1) and (2) do not apply. Petitioner argues that she is attempting to persuade law enforcement officials to investigate additional cases of fraud and abuse relating to the incident with CH, but she does not assert that they would identify program vulnerabilities or weaknesses, and she is unable to identify any of the results specifically required by the regulation. Thus the mitigating factor at 42 C.F.R. § 1001.102(c)(3) does not apply. The other arguments she makes in mitigation of her exclusion do not fall within the ambit of the factors I am allowed to consider as mitigating factors.

I am left to consider whether the 30-year exclusion imposed is within a reasonable range of exclusion. I accept Petitioner's assertions that she is deeply sad and regretful for her involvement in the tragedy of CH's death. However, her actions caused the death of CH, her patient and a two-year-old child, the most serious consequence of any abuse in connection with a health care service. Her three consecutive sentences amount to a term of confinement extending over two decades. Moreover, the Idaho Board has twice found her untrustworthy to provide counseling services. Thus, although 30 years is a lengthy exclusion, I do not find the 30-year exclusion imposed by the I.G. to be unreasonable.

V. Conclusion

For the reasons set forth above, the I.G.'s motion for summary disposition must be, and it is, GRANTED. The I.G. is authorized to exclude Petitioner for a period of 30 years under section 1128(a)(2) of the Act.

/s/
Richard J. Smith
Administrative Law Judge