Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Frances C. Minaya
(OI File No.: H-12-40546-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-1186

Decision No. CR2736

Date: March 28, 2013

DECISION

The Inspector General (I.G.) of the Department of Health and Human Services notified Frances C. Minaya (Petitioner) that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years pursuant to 42 U.S.C. § 1320a-7(a)(3). Petitioner appealed. I find that the I.G. has a basis for excluding Petitioner from program participation and that the five-year exclusion is mandated by law.

I. Background

By letter dated June 29, 2012, the I.G. notified Petitioner that she was being excluded from Medicare, Medicaid, and all federal health care programs for a minimum period of five years pursuant to 42 U.S.C. § 1320a-7(a)(3). I.G. Exhibit (Ex.) 1. The I.G. advised Petitioner that the exclusion was based on her conviction "in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such

items or services, or with respect to any act or omission in a health care program (other than Medicare and a State health care program) operated or financed in whole or in part, by any Federal, State or local Government agency." I.G. Ex. 1, at 1. Petitioner, represented by counsel, timely filed her August 17, 2012 request for hearing (RFH) with the Departmental Appeals Board, Civil Remedies Division. This case was assigned to me for hearing and decision. On September 18, 2012, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated September 19, 2012. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on October 17, 2012, with I.G. Exs. 1 through 5. Petitioner filed a response (P. Br.), which the Civil Remedies Division received on November 16, 2012. Petitioner did not submit any proposed exhibits. The I.G. filed a reply brief (I.G. Reply Br.) on December 3, 2012. Absent objection, I admit I.G. Exs. 1 - 5 into the record.

The I.G. requested a decision on the written record stating that it has no witnesses to offer. I.G. Br., at 6. Petitioner stated that a hearing was required and that Petitioner would be the only witness. P. Br., at 2-3. In an Order dated December 13, 2012, I afforded Petitioner the opportunity to provide her complete, written direct testimony in the form of an affidavit. *See* 42 C.F.R. § 1005.16(b). On January 7, 2013, Petitioner submitted her affidavit. The I.G. declined the opportunity to cross-examine Petitioner. Instead, on January 14, 2013, the I.G. objected to the admission of Petitioner's affidavit on the grounds of relevancy and that it impermissibly collaterally attacks Petitioner's conviction. I.G. Surreply Br., at 2-3. Because Petitioner has the right to testify in her own case, *see* 42 C.F.R. § 1005.3(a)(6), at least some of the Petitioner's written testimony is relevant and material, *see* 42 C.F.R. § 1005.17(c), and the I.G. did not file a motion for summary judgment, *see* 42 C.F.R. § 1005.4(b)(12), I overrule the I.G.'s objections and admit Petitioner's affidavit into the record as Petitioner's Exhibit (P. Ex.) 1

The record in this matter is now closed and all of the evidence of record has been considered in rendering this decision.

II. Issue

Whether the I.G. has a basis for excluding Petitioner for five years from participating in Medicare, Medicaid, and all other federal health care programs, pursuant to 42 U.S.C. § 1320a-7(a)(3). *See* 42 C.F.R. § 1001.2007(a).

III. Findings of Fact, Conclusions of Law, and Analysis[1]

The Secretary of Health and Human Services (the Secretary) must exclude an individual from participation in any federal health care program if that individual:

[1] My findings of fact and conclusions of law are set forth in italics and bold font.

> has been convicted for 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 paragraph (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 relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

42 U.S.C. § 1320a-7(a)(3).

A. Petitioner pled guilty in a Florida court to five counts of exploitation of the elderly/disabled and one count of organized fraud, and the court ordered the adjudication of guilt stayed and withheld.

Petitioner was an employee at the Susanna Wesley Health Care Center (the nursing facility). The Office of the Attorney General, Medicaid Fraud Control Unit for the State of Florida investigated Petitioner for exploitation of funds from the nursing facility's elderly residents. I.G. Ex. 5, at 3. According to the Investigative Summary Report, Petitioner demanded cash payments from residents when in fact no payments were owed. *Id.* The residents' family members made the cash payments to Petitioner or, at least on one occasion, to the Admissions Assistant on behalf of Petitioner. I.G. Ex. 5, at 3, 12.

On August 17, 2009, an Information for 14 counts of felony Exploitation of Elderly/Disabled and one count of felony Organized Fraud – Scheme to Defraud under Florida law was filed against Petitioner. I.G. Ex. 4. On May 5, 2012, Petitioner entered into a plea agreement and pled guilty to Counts 1 through 5 (Exploitation of the Elderly/Disabled) and to Count 15 (Organized Scheme to Defraud). I.G. Ex. 3, at 1. Petitioner entered a guilty plea and a Florida Circuit Court Judge ordered that the adjudication of guilt be stayed and withheld. I.G. Ex. 2, at 1.

B. Petitioner was convicted of a criminal offense for the purposes of 42 U.S.C. § 1320a-7(a)(3).

The I.G. argues that Petitioner was "convicted" of a crime for the purposes of 42 U.S.C. § 1320a-7(a)(3). That statute defines "convicted" to include "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal, State, or local court" or "when the individual . . . has entered into . . . deferred adjudication . . . where judgment of conviction has been withheld." 42 U.S.C. § 1320a-7(i); *see also* 42 C.F.R. § 1001.2.

Petitioner disputes that she has been convicted of a crime. RFH at 1; P. Br., at 1, 2. Petitioner states that she pled "no contest to the charges" and that "the court agreed to withhold adjudication." P. Ex. 1, at 3 (internal quotations omitted). The record confirms that Petitioner's adjudication was withheld but indicates Petitioner pled guilty. I.G. Exs. 2, 3. Petitioner argues, however, that under Florida law a withheld adjudication of guilt does not constitute a conviction. P. Br., at 1-2. The I.G. argues that for purposes of exclusion, federal law and not state law controls. I.G. Reply Br., at 1.

The I.G.'s contention that federal law is determinative as to whether an individual is "convicted" for the purposes of 42 U.S.C. § 1320a-7 is correct. Petitioner's exclusion arises under a federal statutory scheme that is aimed at excluding participation in federal health care programs. *See Manocchio v. Kusserow*, 961 F.2d 1539, 1542 (11th Cir. 1992) ("we find that the legislative history, taken as a whole, demonstrates that the primary goal of [42 U.S.C. § 1320a-7] is to protect present and future Medicare beneficiaries from the abusers of these programs.") As a result, "what constitutes a 'conviction' under [42 U.S.C. § 1320a-7] . . . is determined by federal law, not state law." *Travers v. Shalala*, 20 F.3d 993, 996 (9th Cir. 1994); *Henry L. Gupton*, DAB No. 2058, at 5-6 (2007).

The I.G.'s exhibits and Petitioner's testimony show that Petitioner was granted withholding of adjudication of the charges to which she pled guilty. Such an arrangement is encompassed by the definition of "conviction" under 42 U.S.C. § 1320a-7(i) and, therefore, Petitioner was convicted of a criminal offense within the meaning of the statute. *Rudman v. Leavitt*, 578 F.Supp.2d 812, 815 (D. MD 2008).

C. Petitioner's conviction for fraud or other financial misconduct requires exclusion under 42 U.S.C. § 1320a-7(a)(3) because her criminal conduct related to the delivery of a health care item or service.

An individual must be excluded from participation in any federal health care program if the individual was convicted under federal or state law of a criminal offense related to fraud or other financial misconduct in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(3). Petitioner argues that her criminal offense was not in connection with the delivery of a health care item or service. Petitioner states that she received only occasional payments from family members of residents and "only because the person in charge of finance was not in the building." P. Ex. 1, at 2. Petitioner states that the receipt of payments was not her responsibility and that she gave the payments to the responsible co-worker. P. Ex. 1, at 2. In addition, Petitioner states her duties were limited to filling out paperwork and to assist in the moving of patients about the facility. P. Ex. 1, at 1. Because her job at the nursing facility did not include administrative functions or the collection or disbursement of fees, Petitioner states her conviction was not related to the delivery of health care. P. Br., at 2.

The I.G. argues that Petitioner was the Admissions Director of the nursing facility who oversaw and coordinated the placement of elderly individuals to receive skilled nursing and other services. I.G. Br., at 4. According to the I.G., regardless of Petitioner's job title, Petitioner performed administrative services integral to the delivery of care at the nursing facility. I.G. Reply Br., at 2.

The record in this case fully supports the conclusion that Petitioner's conviction was in connection with the delivery of a health care item or service. According to the Investigative Summary Report, family members of residents made cash payments to Petitioner. I.G. Ex. 5, at 3. The Investigative Summary Report includes sworn statements from family members indicating that Petitioner claimed the cash payments paid to her were patient responsibility payments and/or funds owed by residents. I.G. Ex. 5, at 14-17. I find the Investigative Summary Report and sworn witness statements contained therein reliable because there is an affidavit authenticating the report (I.G. Ex. 5, at 30-31) and because Petitioner did not object to the exhibit. Furthermore, I rely only on those statements that relate to counts 1 – 5, the counts to which Petitioner pled guilty. I.G. Ex. 3, at 1. Specifically, Petitioner represented to residents and their relatives that they needed to make payments so that the residents could obtain care at the nursing facility. Moreover, Petitioner admits that she accepted money while performing her job at the nursing facility, which further substantiates the connection between the criminal conduct and Petitioner's position. P. Ex. 1, at 2. Based on these statements and on the fact that Petitioner pled guilty to Count 15 of the Information entitled "Organized Fraud" (I.G. Ex. 2, at 1), it is clear that Petitioner's offense involved fraud and/or other financial misconduct related to providing health care services.[2] Further, the Secretary has interpreted "delivery of a health care item or service" in 42 U.S.C. § 1320a-7(a)(3) to include "the performance of management or administrative services relating to the delivery of such items or services." 42 C.F.R. § 1001.101(c)(1). Collecting fees from residents of the nursing facility can be characterized as a management or administrative services. Therefore, I find that there is a sufficient nexus between Petitioner's administrative functions and the delivery of health care services. *See* 42 C.F.R. § 1001.101(c)(1).

[2] In this case, all of the nursing facility's residents who were victims of Petitioner's criminal conduct "were fully covered by Medicare for the first 100 days of the victim's [sic] stay and thereafter by Medicaid." I.G. Ex. 5, at 1. In order for a skilled nursing facility to participate in Medicare or Medicaid, it must provide "nursing services" and ensure that residents are seen periodically by a physician. 42 C.F.R. §§ 483.1(b), 483.30, 483.40. Therefore, the nursing facility was providing health care services.

D. Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B).

Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(3), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

IV. Conclusion

For the foregoing reasons, I affirm the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for the statutory five-year minimum period pursuant to 42 U.S.C. § 1320a-7(a)(3), (c)(3)(B).

_____/s/_____
Scott Anderson
Administrative Law Judge