Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Patricia Ann Smith, L.P.N.
(O.I. File No. H-11-42435-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-51

Decision No. CR2805

Date: May 30, 2013

DECISION

The Inspector General (I.G.) of the Department of Health and Human Services excluded Petitioner, Patricia Ann Smith, L.P.N., from participation in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1) for five years. Petitioner appealed. For the reasons stated below, I conclude that the I.G. has a basis for excluding Petitioner from program participation and that the five-year exclusion is mandated by law. Therefore, I affirm the I.G.'s exclusion of Petitioner.

I. Background and Procedural History

By letter dated July 31, 2012, the I.G. notified Petitioner, a licensed practical nurse, that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years pursuant to 42 U.S.C. § 1320a-7(a)(1). I.G. Exhibit (Ex.) 1. The I.G. advised Petitioner that her exclusion was based on her conviction

> in the Court of Common Pleas of Franklin County, Ohio, of a criminal offense related to the delivery of an item or service under the Medicare or a

> State health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program.

I.G. Ex. 1, at 1.

Petitioner timely filed a request for hearing (RFH) and I was assigned to hear and decide this case. On November, 14, 2012, I convened a telephonic prehearing conference. During the prehearing conference, Petitioner stated that she was actively seeking representation, but was not currently represented by an attorney. I continued the prehearing conference so that Petitioner could secure counsel. I reconvened the prehearing conference by telephone on December 12, 2012. The substance of the prehearing conference is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated December 13, 2012. *See* 42 C.F.R. § 1005.6.

Pursuant to the Order, the I.G. filed a brief (I.G. Br.) along with seven proposed exhibits (I.G. Exs. 1-7). Petitioner subsequently filed a brief (P. Br.) and four proposed exhibits (P. Exs. 1-4). The I.G. filed a reply brief.

Neither party objected to any of the proposed exhibits. Therefore, I admit I.G. Exs. 1-3, 5-7 and P. Exs. 1-4 into the record. However, for the reasons stated below, I exclude I.G. Ex. 4 from the record.

The I.G.'s fourth exhibit is a declaration from an attorney in the state attorney general's office that criminally prosecuted Petitioner. The declaration appears to have been produced for this proceeding because the top of the document shows the caption of this case. *See* I.G. Ex. 4, at 1.

Although I may accept written direct testimony, the I.G. did not request that I do so in this case. *See* 42 C.F.R. § 1005.16(b). To the contrary, the I.G. expressly stated that he did not have any witnesses to offer and that a hearing was not necessary. I.G. Br. at 5. However, it is clear from reading the declaration that it contains substantive testimony specifically intended to support the I.G.'s case. Although a declaration from a prosecutor is permissible evidence, *see Lyle Kai, R.Ph.*, DAB No. 1979 (2005), this does not absolve the I.G. from failing to properly indicate in his brief that he has a witness and is submitting that testimony in writing so that Petitioner, who is pro se, might seek to cross-examine that witness. *See* 42 C.F.R. § 1005.16(b).

"At the discretion of the [administrative law judge], testimony (other than expert testimony) may be admitted in the form of a written statement." *Id*. Based on the I.G.'s failure to properly notice his witness and request that I accept written testimony, I exclude I.G. Ex. 4 from the record. *Cf. Beth Ann Lee, R.N.*, DAB CR2735, at 2 (2013)

review declined, DAB No. 2512 (2013) (exclusion of prosecutor's declaration under similar circumstances to this case).

Because both parties indicated that a hearing is not necessary in this case (I.G. Br. at 5; P. Br. at 2), I decide this case on the basis of the written record.

II. Issue

The only issue in this case is whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1). 42 C.F.R. § 1001.2007(a)(1)-(2).

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

The Secretary of Health and Human Services must exclude from participation in any federal health care program "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under subchapter XVIII of this chapter or under any State health care program." 42 U.S.C. § 1320a-7(a)(1).

A. *Petitioner was convicted by a jury of theft in the fifth degree due to improper billing for nursing services and a state court entered judgment against her.*

Petitioner is a licensed practical nurse. *See* I.G. Ex. 2. On July 9, 2010, a grand jury in Franklin County, Ohio indicted Petitioner on one felony count of theft in the fifth degree in violation of section 2913.02(A) of the Ohio Revised Code. I.G. Ex. 5, at 1. According to the indictment, Petitioner unlawfully obtained money from the Ohio Department of Job and Family Services (JFS). The indictment specifically charged that Petitioner,

> [b]eginning on or about September 21, 2009 and continuing until on or about October 21, 2009 . . . as a continuing course of criminal conduct . . . did knowingly obtain control over the property or services by deception, to wit: obtaining money from the Ohio Department of Job and Family Services to which she was not entitled, the value of said property or services being five hundred dollars ($500.00) or more, but less than five thousand dollars ($5,000.00) . . . a felony of the fifth degree.

On August 26, 2011, a jury found Petitioner guilty of theft in the fifth degree. I.G. Ex. 6. The court entered judgment against Petitioner, sentencing her to "community control" for a period of one (1) year under basic supervision and ordering her to pay $1,189.66 in restitution. I.G. Ex. 7, at 1-2. Petitioner concedes her conviction. RFH at 2.

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[1] My findings of fact and conclusions of law are set forth in italics and bold font as headings in this section of the decision.

B. *Petitioner was convicted of a criminal offense for the purposes of 42 U.S.C. § 1320a-7(a)(1).*

Under 42 U.S.C. § 1320a-7(a)(1), a petitioner must be "convicted of a criminal offense" before the I.G. is authorized to exclude the individual. A "conviction" includes "when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court [or] when there has been a finding of guilt against the individual or entity by a Federal, State, or local court." 42 U.S.C. § 1320a-7(i)(1)-(2). Here, the Court of Common Pleas for Franklin County, Ohio entered a judgment of guilty against Petitioner based on the jury verdict. I.G. Ex. 7, at 1. Accordingly, Petitioner was "convicted" of a criminal offense within the meaning of the statute because she was found guilty and the court entered judgment based on that finding. 42 U.S.C. § 1320a-7(i)(1).

Petitioner does not dispute that a jury convicted her, but she nevertheless claims that she did not commit the crime. P. Br. at 4-5; RFH at 1-2. Petitioner asserts she performed the services for which she submitted claims to JFS and that the investigation by the Ohio Attorney General's Office was both "incomplete" and "inadequate." P. Br. at 4-5.

By regulation, "the basis for the underlying conviction . . . is not reviewable and the individual . . . may not collaterally attack it either on substantive or procedural grounds in this appeal." 42 C.F.R. § 1001.2007(d); *see also Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994) (holding that it is unnecessary to provide an excluded individual with the opportunity to relitigate the facts underlying the criminal conviction). Therefore, Petitioner's assertion that she is innocent of the crime for which she was convicted is not relevant to this case and cannot serve as a basis to reverse the exclusion.

C. *Petitioner must be excluded under 42 U.S.C. § 1320a-7(a)(1) because her conviction was for an offense related to the delivery of an item or service under a state health care program.*

The I.G. must exclude an individual from participation in any federal health care program if the individual was convicted under federal or state law of a criminal offense related to the delivery of an item or service under the Medicare program or a state health care program. 42 U.S.C. § 1320a-7(a)(1). In the present case, the evidence of record shows that there is a nexus between the criminal offense for which Petitioner was convicted and the delivery of an item or service under a state health care program.

Petitioner was charged with and convicted of unlawfully obtaining between $500 and $5,000 from JFS. I.G. Ex. 5, at 1; I.G. Ex. 3 ¶ 5. Petitioner stipulated during her criminal

case that JFS implements and operates the Ohio Medicaid program[2] and Petitioner was a Medicaid provider under the agreement she entered into with JFS. I.G. Exs. 2; 3 ¶¶ 2, 7. Petitioner's criminal offense involved billing JFS for nursing services that she did not provide (*see* P. Br. at 4-6), and the criminal trial court ordered Petitioner to pay restitution to JFS. I.G. Ex. 7 at 2. Finally, Petitioner does not dispute that her conviction was "related to the delivery of an item or service under Medicare or a State health care (a State Medicaid) program." P. Br. at 2.

Because there is a clear nexus between Petitioner's conviction and the delivery of services under a state health care program, I conclude that the record supports Petitioner's mandatory exclusion under 42 U.S.C. § 1320a-7(a)(1).

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

Petitioner argues that the length of the exclusion imposed by the I.G. is unreasonable. RFH at 2. However, Petitioner must be excluded for a minimum period of five years because, as discussed above, there is a basis to exclude Petitioner pursuant to the mandatory exclusion provision of the Act. 42 U.S.C. § 1320a-7(a)(1), (c)(3)(B). The statute does not give me discretion to reduce a five-year exclusion. *See Manocchio v. Kusserow*, 961 F.2d 1539, 1542 (11th Cir. 1990). Therefore, Petitioner must be excluded for at least five-years.

Petitioner also asserted that she is an honest and competent licensed practical nurse. RFH at 1-2. There is nothing in the record to show that Petitioner was deficient in the care she provided to her patients. P. Br. at 6; P. Ex. 4. However, the quality of Petitioner's services as a nurse is not relevant to the length of exclusion required by statute.

IV. Conclusion

For the foregoing reasons, I affirm the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for the statutory five-year minimum period pursuant to 42 U.S.C. § 1320a-7(a)(1).

/s/
Scott Anderson
Administrative Law Judge

[2] The Medicaid program is a "State health care program" for purposes of the exclusion regulations. *See* 42 C.F.R. § 1001.2.