Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sandra McElwain,
(OI File No. 3-08-40524-9)),

Petitioner,

v.

The Inspector General.

Docket No. C-13-153

Decision No. CR2813

Date: June 7, 2013

DECISION

Petitioner, Sandra McElwain, appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude her from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) for the minimum mandatory period of five years. For the reasons discussed below, I find the I.G. was authorized to exclude Petitioner. I further find that the five year exclusion is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background

The I.G. notified Petitioner, by letter dated October 31, 2012, that she was being excluded pursuant to section 1128(a)(1) of the Act from participation in Medicare, Medicaid and all federal health care programs for the minimum period of five years. The I.G. advised Petitioner that the exclusion was based on her conviction in the United States District Court for the Western District of Virginia, of a criminal offense related to the delivery of an item or service under Medicare or state health care programs. I.G. Ex. 1.

Petitioner timely filed her request for hearing. I convened a prehearing telephone conference with the parties, which I summarized in my Order and Schedule for Filing Briefs and Documentary Evidence dated January 7, 2013. During the prehearing conference, I explained to Petitioner that she is entitled to representation by counsel but that I cannot appoint or pay for counsel for her. I also told her that if she should choose later to be represented by counsel, she need only have her attorney submit a Notice of Appearance to my office as soon as possible. Petitioner proceeded to represent herself.

Pursuant to my scheduling order, I asked the parties to answer the questions on the short-form briefs sent to them, together with any additional arguments and supporting documents. The I.G. filed the short-form brief together with exhibits (I.G. Exs.) 1 through 5. Absent objection, I admit I.G. Exs. 1 through 5. Petitioner submitted a handwritten brief (P. Br.) consisting of eight pages, six exhibits (P. Exs. 1-2, 4-7), and the last two pages of her short-form brief, Sections II-IV.[1] The I.G. then submitted a reply brief (I.G. Reply). Petitioner's exhibits were offered in support of an attack of her underlying conviction. Such collateral attacks are impermissible. 42 C.F.R. §1001.2007(d). Therefore, these documents are irrelevant, and I must exclude them from the record. 42 C.F.R. §1005.17(c).

Petitioner indicated that she wanted to present testimony of several witnesses. P. Br. The I.G. objected to an in-person hearing because the material facts in this case are not in dispute and Petitioner's witnesses, and their expected testimony, were proposed for the purpose of challenging and attempting to re-litigate Petitioner's conviction. I.G. Reply at 6. I agree that there are no material facts in dispute. I further agree that the testimony that Petitioner wishes to present is not relevant to these proceedings as they amount to a collateral attack of the offense to which Petitioner voluntarily pled guilty. 42 C.F.R. § 1001.2007(d). Therefore, the record is now closed, and I decide this case based on the written record.

II. Discussion

A. Issue

The scope of my review here is limited. 42 C.F.R. § 1001.2007(a)(1) and (2). The only issue before me 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 section 1128(a)(1) of the Act. If I find that the I.G. was authorized to exclude Petitioner then I must uphold the I.G.'s exclusion because it is for the minimum mandatory period of five years pursuant to the statute. Act § 1128 (c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

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[1] Petitioner's submission did not include an Exhibit 3 and an Exhibit 8 although she described an Exhibit 8 in her submission as statements and letters pertaining to her underlying conviction, which she does not deny.

B. Findings of Fact and Conclusions of Law

1. Petitioner pled guilty to one count of False Statements Relating to Health Care Matters in violation of 18 U.S.C. § 1035(a)(2) in the United States District Court for the Western District of Virginia.

Petitioner, through her company, Health Care Virginia, LLC (HCVA), provided personal care and respite services to Virginia Medicaid beneficiaries.[2] I.G. Ex. 4, at 2. Petitioner served as HCVA's Executive Director and Registered Nurse (R.N.). I.G. Ex. 4, at 2, 3. The Virginia Department of Medical Assistance (DMAS), which administers the Medicaid program in Virginia, requires that personal care aides (PCAs), who provide personal care services to Medicaid beneficiaries, receive a minimum of 40 hours of training prior to their employment. Such training must be supervised and taught by an R.N. licensed in Virginia. I.G. Ex. 4, at 3-4.

On March 10, 2011, Petitioner was indicted on one count of False Statements Relating to Health Care Matters pursuant to 18 U.S.C. § 1035. I.G. Ex. 4, at 21. On that same date, Petitioner voluntarily agreed to enter a plea of guilty to this one count, understanding that by doing so she was subject to a maximum statutory penalty of $250,000 as well as imprisonment. I.G. Ex. 2. She also agreed to assist her co-defendant and company, HCVA, to pay restitution in the amount of $323,420.20 to DMAS. I.G. Ex. 2, at 1, 4-5. On February 6, 2012, the court entered a judgment against Petitioner based on her guilty plea. Petitioner was sentenced to 16 months incarceration. I.G. Ex. 3.

2. Petitioner was convicted of a criminal offense for purposes of section 1128(a)(1) of the Act.

The Secretary of the U.S. Department of Health and Human Services must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1) (42 U.S.C. § 1320a-7(a)(1)); *see also* 42 C.F.R. § 1001.101(a). An individual is considered convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) when the individual has entered into any arrangement or program where judgment of conviction is withheld. Act § 1128(i) (42 U.S.C § 1320a-7(i)(3)); *see also* 42 C.F.R. § 1001.2.

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[2] Petitioner owned 49 percent of HCVA and her husband owned 49 percent. Petitioner's daughter owned the other two percent. I.G. Ex. 4, at 1.

Petitioner, with advice of her counsel, voluntarily agreed to enter into a plea agreement with the United States for the criminal offense of making false statements and entries in connection with the payment for health care services. I.G. Ex. 2; I.G. Ex. 3. I therefore find that her plea of guilty and the acceptance of that plea by the court establish that Petitioner was convicted of a criminal offense within the meaning of the exclusion statute.

3. Petitioner's conviction requires exclusion under section 1128(a)(1) because her criminal conduct related to the delivery of an item or service under Medicaid.

A conviction is related to the delivery of a health care item or service under Medicare or a state health care program if there is a "common-sense connection or nexus between the offense and the delivery of an item or service under the program." *Scott D. Augustine*, DAB No. 2043, at 5-6 (2006)(citations omitted).

Here, Petitioner pled guilty to failing to provide the required DMAS training, issuing false training certifications to PCAs hired and employed by her and HCVA, and generating false training class sign-in sheets and skills review checklists to cover up for the lack of training of PCAs assigned to provide services to Medicaid beneficiaries. I.G. Ex. 4, at 4-5. Petitioner also prepared false Nursing Assessments for Medicaid recipients to document their need for continued PCA services. I.G. Ex. 4, at 5. As a result, from October 2007 through June 2010, Petitioner's company HCVA billed and was paid over $980,000 in Medicaid funds for non-certified, untrained, PCAs who provided personal and respite care services to Medicaid beneficiaries. I.G. Ex. 4, at 5.

Petitioner's guilty plea to Count 1 of her indictment directly related to Petitioner's failure to follow Virginia Medicaid requirements for employee training, nursing assessments, and certifications. In addition, Petitioner's guilty plea is predicated upon her false statements and entries in connection with the payment for health care services in violation of 18 U.S.C. § 1035. As a result, the Virginia Medicaid program paid for services provided by Petitioner's company to Medicaid beneficiaries based on Petitioner's false representations. I.G. Ex. 4. Thus, I conclude that Petitioner's conviction here is directly related to the delivery of an item or service under the Medicaid program in Virginia within the meaning of section 1128(a)(1) of the Act and find the requisite "nexus or common-sense connection" between the conduct giving rise to Petitioner's offense and the delivery of Medicaid services.

Also, Petitioner acknowledged that the offense to which she pled guilty, "making false statements concerning health care matters" under title 18 of the United States Code, is correct in nature and that the acts underlying her conviction "did occur." P. Br. at 3. Yet, Petitioner sets forth numerous arguments which amount to collateral attacks on the

accuracy of the charges underlying her conviction. The applicable regulation explicitly precludes any collateral attack on Petitioner's conviction:

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

42 C.F.R. § 1001.2007(d). Statutory and regulatory authority require exclusion under the circumstances here if the elements of section 1128(a)(1) are met. Thus, I must uphold the exclusion and may not consider Petitioner's collateral attacks.

4. Petitioner must be excluded for the statutory minimum period of five years.

An exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.102(a). The period of exclusion may be extended based on the presence of specified aggravating factors. 42 C.F.R. § 1001.102(b). Only if the aggravating factors justify an exclusion of longer than five years are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). The I.G. does not cite any aggravating factors in this case and does not propose to exclude Petitioner for more than the minimum period of five years. Therefore, I have no authority here to consider any mitigating factors despite Petitioner's contentions that I should do so.[3]

Because I conclude that that a basis exists to exclude Petitioner pursuant to section 1128(a)(1), then exclusion of Petitioner for the minimum period of five years is mandatory and is reasonable as a matter of law.

5. I am not authorized to grant relief based on Petitioner's equitable arguments.

Petitioner asks that I consider certain equitable arguments and use discretion to allow her to continue to work as a nurse and lift the exclusion imposed against her. P. Br. at 7. She requests that I consider that an appellate court granted her an appeal, even though she states that she voluntarily withdrew that appeal. I am without discretion or any authority to provide Petitioner equitable relief based on her ability to appeal her underlying conviction or for any other reasons outside the applicable statute and regulations, to which I am bound.

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[3] Even if I were authorized to consider them, Petitioner failed to allege the elements of any of the type of mitigating factors that the I.G. could consider. 42 C.F.R. § 1001.102(c).

Petitioner also explains that she is unfamiliar with the law and asks that, if I find that her brief was "inaccurately filed," I continue this matter for 6 months to allow Petitioner time to obtain counsel. At an initial stage of this proceeding, I informed Petitioner that she was entitled to representation by counsel but that I could not appoint one for her. *See Order and Schedule for Filing Briefs* dated January 7, 2013 at 2. She indicated she understood this and that she would proceed to represent herself. I also indicated that if she later chose to retain counsel, she should do so as soon as possible and have counsel file a notice of appearance. Considering Petitioner was aware of her right to representation and that her incarceration did not preclude her from seeking counsel, I find no basis for continuing this matter.

III. Conclusion

For the foregoing reasons, I sustain the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for the statutory five-year period pursuant to section 1128(a)(1) and (c)(3)(b).

/s/
Joseph Grow
Administrative Law Judge