Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jodi Lynn Gaeta,

Petitioner,

v.

The Inspector General.

Docket No. C-13-307

Decision No. CR2828

Date: June 17, 2013

DECISION

This matter is before me on review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Jodi Lynn Gaeta 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 section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). The facts of this case require the imposition of a five-year exclusion, and so I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner Jodi Lynn Gaeta is a licensed practical nurse, and in December 2009 she was employed in that capacity at a nursing home in Crookston, Minnesota. On or about December 17, 2009, she stole tablets of Lorcet, a medication containing the controlled substance hydrocodone, from the supply of that medication belonging to one of the nursing home's residents. Local law enforcement authorities learned of the theft and on January 8, 2010 charged Petitioner with violations of MINN. STAT. § 609.62.2(1) and .3(2), and MINN. STAT. § 152.025.2(a)(1), both felonies related to controlled substances. I.G. Exhibit (Ex.) 3.

Records reflecting the next steps in Petitioner's prosecution are peculiarly unhelpful, and are insufficient to explain how the two felony charges filed in January resulted in proceedings in the District Court, Ninth Judicial District, County of Polk, Minnesota, on April 12, 2010. The records do not indicate whether Petitioner reached some sort of plea agreement with prosecuting authorities, whether there were any proceedings between January and April 2010 in which she might have actually tendered and the District Court might have accepted her guilty plea to one of the charges, or whether she went to trial and was found guilty by jury verdict or bench decision.[1] All that this unsatisfactory record shows is that on April 12, 2010, the District Court stayed imposition of sentence for five years, based on Petitioner's apparent "conviction" of a violation of MINN. STAT. § 152.025.2(a)(1), a fifth-degree felony, and placed her on probation subject to certain conditions and costs. I.G. Ex. 4. The District Court relied on MINN. STAT. § 609.135 as the authority by which it stayed the imposition of Petitioner's sentence.

The I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, as required by section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), on November 30, 2012. On that date the I.G. notified Petitioner that she was being 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 January 17, 2013. I convened a telephonic prehearing conference on February 14, 2013, 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 February 14, 2013, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case closed on May 21, 2013.

There are five exhibits in this case. The I.G. proffered five exhibits marked I.G. Exhibits 1 through 5 (I.G. Exs. 1-5), and they are admitted without objection. Petitioner has proffered no exhibits of her own.

II. Issues

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

> 1. 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)(3) of the Act; and

[1] See the last section of paragraph 7 of my Order of February 14, 2013.

2. Whether the length of the proposed period of exclusion is unreasonable.

I resolve both issues in favor of the I.G.'s position. Because her predicate conviction has been established, there is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act. A five-year term of exclusion is the minimum established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B) and is therefore not unreasonable.

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 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 [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 terms of section 1128(a)(3) are restated in similar language at 42 C.F.R. § 1001.101(c).

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court," Act § 1128(i)(1); "when there has been a finding of guilt against the individual . . . by a Federal, State, or local court," Act § 1128(i)(2); "when a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court," Act § 1128(i)(3); or "when the individual . . . has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." Act § 1128(i)(4). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(3) is mandatory and the I.G. must impose it for a minimum period of five years. Act § 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.

IV. Findings and Conclusions

I find and conclude as follows:

1. The District Court, Ninth Judicial District, County of Polk, Minnesota, stayed the imposition of sentence against Petitioner Jodi Lynn Gaeta on April 12, 2010 in

proceedings based on her alleged violation of, *inter alia*, MINN. STAT. § 152.025.2(a)(1), a fifth-degree felony. The felonious conduct on which the proceedings against Petitioner were based occurred on or about December 17, 2009. I.G. Exs. 3, 4.

2. The stay of imposition of sentence described above in Finding 1 above constitutes a "conviction" within the meaning of sections 1128(a)(3) and 1128(i) (4) of the Act, and 42 C.F.R. § 1001.2.

3. There is a nexus and a common-sense relationship between the felony offense of which Petitioner was convicted, as noted above in Findings 1and 2 above, and theft or embezzlement in connection with the delivery of a health care item or service. I.G. Exs. 3, 4.

4. Petitioner's conviction as noted above in Findings 1, 2, and 3 constitutes a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Act § 1128(a)(3); 42 U.S.C. § 1320a-7(a)(3).

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

6. There are no disputed issues of material fact and summary disposition 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); *Morganna Elizabeth Allen*, DAB CR1479 (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 contest the I.G's proof of the four essential elements, and concedes that she is in fact subject to exclusion. I note that I.G. Exs. 3 and 4 plainly set out the date of Petitioner's alleged offense, its classification as a felony, its gravamen as a theft or embezzlement, and its nexus to the delivery of a health care item or service. And, although Petitioner does not articulate the argument herself, I note that the disposition of her case under the procedure established by MINN. STAT. § 609.135, the stay of imposition of sentence and the potential reduction of her conviction to a misdemeanor, does not invalidate her conviction for purposes of this exclusion. Instead, the established law of this forum requires that the Act's definitions of "conviction" be applied in these circumstances. *Ellen L. Morand*, DAB No. 2436 (2012); *Henry L. Gupton*, DAB No. 2058 (2007), *aff'd sub nom. Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008); *Marc Schneider, D.M.D.*, DAB No. 2007 (2005); *Carolyn Westin*, DAB No. 1381 (1993), *aff'd sub nom. Westin v. Shalala*, 845 F. Supp. 1446 (D. Kan. 1994). The specific definition of "conviction" noted in section 1128(i)(4) of the Act encompasses the proceedings against Petitioner.

What she seeks in this appeal is in effect a shortening of the five-year length of her exclusion, asking that it be made retroactive to begin concurrently with the date of her conviction, April 12, 2010. The I.G. did not complete the process of excluding Petitioner until November 30, 2012, and Petitioner quite correctly points out that the I.G. waited over 31 months after her conviction to exclude her. When measured against the five-year period of exclusion that the I.G. seeks to impose, the delay obviously amounts to a significant *de facto* enhancement of that period. Whether that extension of her exclusion until December 20, 2017 — an extension attributable solely to the I.G.'s unexplained delay — is defensible in terms of the statute's remedial goal, or fair in any sense at all, is not a question I am authorized to ask or answer. Simply stated, the beginning date of Petitioner's exclusion is established by operation of law as 20 days from the date of the I.G.'s November 30, 2012 notice letter. Act § 1128(c)(1), 42 U.S.C. § 1320a-7(c)(1); 42 C.F.R. § 1001.2002(b). I have no authority to change that date. *Randall Dean Hopp*, DAB No. 2166 (2008); *Lisa Alice Gantt*, DAB No. 2065 (2007); *Kailash C. Singhvi, M.D.*, DAB No. 2138 (2007).

The five-year period of exclusion proposed in this case is the 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).

I repeat that Petitioner appears here *pro se*. Because of that I have been guided by the Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991). I have searched all of Petitioner's pleadings for any arguments or contentions that might raise a valid, relevant defense to the I.G.'s Motion, but have found nothing that could be so construed.

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; *Thelma Walley*, DAB No. 1367. 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 Jodi Lynn Gaeta from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, pursuant to the terms of section 1128(a)(3) of the Act, is SUSTAINED.

/s/
Richard J. Smith
Administrative Law Judge