Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Christina Ortega,
(OI File No. H-12-42078-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-1103

Decision No. CR3145

Date: March 6, 2014

DECISION

Petitioner, Christina Ortega, was a hospital administrator, working in Florida, who became embroiled in her employer's Medicaid racketeering scheme. She pled guilty in Florida State Court to four misdemeanor counts of obstructing justice. Based on her conviction, the Inspector General (I.G.) initially excluded her for three years from participation in the Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(b)(2) of the Social Security Act (Act). The I.G. subsequently amended its exclusion, and now excludes her for five years, pursuant to section 1128(a)(1) of the Act. Petitioner has appealed.

For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner under section 1128(a)(1), and that the statute mandates a minimum five-year exclusion.

Background

Petitioner Ortega worked as hospital administrator at Trinity Community Hospital, which was part of HC Healthcare, Inc. I.G. Exhibit (Ex.) 8 at 7. She, along with other HC Healthcare employees and its officers, were charged with multiple felony counts of

racketeering and conspiracy to defraud Florida-funded healthcare programs, including Medicaid and the Rural Hospital Capital Improvements Grants Program. I.G. Ex. 2; *see* I.G. Ex. 8. On July 21, 2011, she pled guilty to four misdemeanor counts of obstructing justice. I.G. Ex. 3.

In a letter dated May 31, 2013, the I.G. notified Petitioner that she was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of three years, because she had been convicted of a criminal offense "in connection with the interference with or obstruction of an investigation into a criminal offense. . . ." I.G. Ex. 1. The letter explained that section 1128(b)(2) of the Act authorizes the exclusion. I.G. Ex. 1. Petitioner requested review.

While these proceedings were pending, the I.G. asked leave to file an amended exclusion notice, changing the basis for the exclusion from section 1128(b)(2), which is permissive, to section 1128(a)(1), which is mandatory, and extending the length of the exclusion to five years, also mandatory. The I.G. pointed out, correctly, that, under section 1128(a)(1), he must impose a mandatory exclusion, if he finds a basis for one. Petitioner did not object, and I granted the I.G.'s motion and set a briefing schedule for supplemental briefs.

The I.G. submitted its supplemental brief, but Petitioner did not. In orders dated December 18, 2013 and January 13, 2014, I directed Petitioner to show cause why her request for hearing should not be dismissed for abandonment, and, if she had not abandoned her appeal, I directed her to file her written arguments and exhibits. Petitioner has not responded to the I.G.'s supplemental brief. The parties agree that an in-person hearing is not necessary. I.G. Br. at 5; P. Br. at 4. I therefore close the record and issue this decision based on the parties' written submissions.

Each party submitted an initial brief addressing the section 1128(b)(2) exclusion. (I.G. Br.; P. Br.). The I.G. submitted a supplemental brief addressing the section 1128(a)(1) exclusion. (I.G. Supp. Br.). The I.G. submitted nine exhibits (I.G. Exs. 1-9). In the absence of an objection, I admit into evidence I.G. Exs. 1-9.

Issue

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from program participation. Because an exclusion under section 1128(a)(1) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Discussion

Petitioner must be excluded for five years because she was convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health program, within the meaning of section 1128(a)(1) of the Social Security Act.[1]

In its supplemental notice letter, which is dated October 21, 2013, the I.G. advised Petitioner that, because she had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health care program, the I.G. was excluding her from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. I.G. Ex. 7.

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.[2] 42 C.F.R. § 1001.101.

Petitioner admits that she was convicted of a criminal offense within the meaning of section 1128(a)(1), but argues that her crimes were not related to the delivery of an item or service under the Medicaid program. Petitioner points out that she pled guilty to misdemeanors under FLA. STAT section 843.02 (2012). That section makes it a crime to "resist, obstruct, or oppose" any officer who is executing a legal process or legal duty. According to Petitioner, section 843.02, "on its face," does not constitute interference with or obstruction of an investigation into any criminal offense described in 42 C.F.R. §§ 1001.101 or 1001.201. P. Br. at 2.

In determining whether a conviction is program-related within the meaning of section 1128(a)(1), I may look beyond the language of the statute under which Petitioner was convicted. An offense is related to the delivery of an item or service under Medicare or a state health care program if there is "a nexus or common-sense connection" between the conduct giving rise to the offense and the delivery of the item or service. *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Berton Siegel, D.O.*, DAB No. 1467 (1994). It is well-settled that the I.G. may rely on extrinsic evidence to explain the circumstances underlying a conviction. The regulations specifically provide that evidence of "crimes, wrongs, or acts other than those at issue in the instant case is admissible to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme."

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[1] I make this one finding of fact/conclusion of law.

[2] The term "state health care program" includes a state's Medicaid program. Act § 1128(h)(1); 42 C.F.R. § 1320a-7(h)(1).

42 C.F.R. § 1005.17(g); *see Narendra M. Patal, MD*, DAB No. 1736 (2000); *Tanya A. Chuoke, RN*, DAB No. 1721 (2000); *Bruce Lindberg*, DAB No. 1280 (1991).

Here, I need not look far to find the necessary connection between Petitioner's crimes and the Medicaid program. First, by her own admission, she was prosecuted by the Office of the Attorney General, who acted as special prosecutor for the Medicaid Fraud Control Unit. P. Br. at 2. Second, as the criminal complaint makes clear, the criminal enterprise that underlay her conviction stemmed from a scheme to defraud the state Medicaid program. I.G. Ex. 2. Indeed, three of the four counts charged were for Medicaid fraud. I.G. Ex. 3 at 1. The plea agreement characterizes her crimes as "lesser included" offenses. Finally, she agreed to pay $10,000 in restitution to the state's Medicaid Fraud Control Unit. I.G. Ex. 3 at 2, 4; I.G. Ex. 4. I consider these factors sufficient to establish the necessary connection.

Petitioner was therefore convicted of a crime related to the delivery of an item under the Medicaid program, and is subject to a minimum five-year exclusion. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Petitioner also complains that the prosecution, although acting on behalf of the Medicaid Fraud Control Unit, failed to warn her that, based on her guilty plea, she would be subject to an exclusion. P. Br. at 3. She also claims that she had an exemplary career until she went to work for HC Healthcare, that she was employed there for just three months before charges were brought, and that she presents "no propensity for future abuse." P. Br. at 4. These are not bases for overturning a mandatory exclusion.

Because the I.G. has imposed an exclusion of five years, the length of the exclusion is not reviewable. 42 C.F.R. § 1001.2007(a)(2).

Conclusion

The I.G. properly excluded Petitioner from participation in Medicare, Medicaid and other federal health care programs, and the statute mandates a five-year minimum period of exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge