Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

A. Bala Setty
(OI File No. H-16-42277-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-410

Decision No. CR4897

Date: July 28, 2017

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Bala Annaiahsetty Setty, M.D., also known as A. Bala Setty, from participation in Medicare, Medicaid, and all other federal health care programs based on Petitioner's conviction of a criminal offense related to the abuse of a patient in connection with the delivery of a health care item or service. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner because he was convicted of assault and battery on a patient that was in connection with the delivery of a health care item or service. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner, and an exclusion for the minimum period of five years is mandatory pursuant to 42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background

By letter dated December 30, 2016, the IG notified Petitioner that, pursuant to section 1128(a)(2) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(2), he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years, effective 20 days from the date of the letter. IG

Exhibit (Ex.) 1 at 1. In the letter, the IG informed Petitioner of the factual basis for the exclusion, stating:

> This action is being taken under section 1128(a)(2) of the Act and is effective 20 days from the date of this letter. See 42 U.S.C. 1320a-7(a), 42 C.F.R. 1001.101(b). This exclusion is due to your conviction as defined in section 1128(i) (42 U.S.C. 1320a-7(i)), in the State of Michigan, Third Judicial Circuit Court, Wayne County, of a criminal offense related to neglect or abuse of patients, in connection with the delivery of a health care item or service, including any offense that the Office of Inspector General (OIG) concludes entailed, or resulted in, neglect or abuse of patients (the delivery of a health care item or service includes the provision of any item or service to any individual to meet his or her physical, mental, or emotional needs or well-being, whether or not reimbursed under Medicare, Medicaid, or any Federal health care program).

IG Ex. 1 at 1. The IG informed Petitioner that the exclusion was for "the minimum statutory period of 5 years." IG Ex. 1 at 1; *see* 42 U.S.C. § 1320a-7(c)(3)(B).

Petitioner timely filed a request for hearing before an administrative law judge that was dated February 27, 2017, and received on March 1, 2017.[1] On March 27, 2017, I convened a pre-hearing conference by telephone pursuant to 42 C.F.R. § 1005.6, during which I clarified the issues of the case and established a schedule for the submission of pre-hearing briefs and exhibits. The schedule and summary of the pre-hearing conference was memorialized in an Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated March 27, 2017.

Pursuant to the Order, the IG filed an informal brief (IG Br.) along with six proposed exhibits (IG Exs. 1-6), and also filed a reply brief (IG Reply). Petitioner filed an informal brief[2] (P. Br.) and no exhibits.[3]

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[1] Petitioner identified the victim of his abuse by name in his request for hearing. Contemporaneous to the issuance of this decision, staff from the Civil Remedies Division have removed the request for hearing from the online docket and replaced it with a version in which the victim's name is redacted. *See* 42 C.F.R. § 1005.18(d).

[2] Petitioner identified the victim of his abuse by name in his brief. Contemporaneous to the issuance of this decision, staff from the Civil Remedies Division have removed the informal brief from the online docket and replaced it with a version in which the victim's name is redacted. *See* 42 C.F.R. § 1005.18(d).

[3] Petitioner did not provide answers to the questions contained in the short form brief.

The IG states that an in-person hearing is not necessary for me to decide this case. IG Br. at 7. Petitioner has requested an in-person hearing, stating:

> In this case, I wish to testify on my own behalf and present other in-person testimony where I would like to call various witnesses from my office who were working on January 3, 2014. They will provide for the court necessary facts about the complainant in this case and their words will be more meaningful than a paper police report. The IG says that the testimony is not necessary because this court cannot "delve into the underlying facts to determine guilt." I do not deny that I was found guilty of a misdemeanor, I simply deny that I committed any abuse or neglect and I deny that any misdemeanor was committed during any providing of any healthcare item or service to the complainant.

P. Br.[4] Petitioner also contends that "[t]he testimony of the complainant is therefore necessary."[5] While Petitioner proposes to testify and to offer the testimony of unspecified others, I point out that Petitioner has not availed himself of the opportunity to submit written direct testimony, nor has Petitioner indicated that he was unable to obtain the written direct testimony of an essential witness, as discussed in section 6(b) of my Order. *See Lena Lasher, aka Lena Contang, aka Lena Congtang,* DAB No. 2800 at 4 (2017) (discussing that when neither party submits written direct testimony as directed, "no purpose would be served by holding an in-person hearing"). In offering the parties an opportunity to submit written direct testimony, I explained that I would not accept direct testimony given for the purpose of attacking "any underlying conviction, civil judgment imposing liability, determination by another government agency, or any prior determination where the facts were determined and a final decision was made, if the conviction, judgment, or determination is the basis for the exclusion." Order, § 6(b). In my Order, I also informed the parties of the following with respect to direct testimony:

> Direct testimony must be marked as an exhibit and submitted with a party's documentary exhibits. 42 C.F.R. § 1005.16(b). Any written direct testimony must be in the form of an affidavit or declaration that complies with 28 U.S.C. § 1746. A live hearing, if necessary, will only be for cross-examination of a witness or witnesses who provided direct testimony, if it is deemed necessary. Any request for cross-examination should be submitted no later than the date the IG's reply brief is due, as stated in Section 7(c)(iii) of this Order.

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[4] Because Petitioner's brief is not paginated, I have not provided any pinpoint citations to Petitioner's brief.

[5] While Petitioner refers to the victim of his crime as "the complainant," I will refer to this individual as "the victim."

Order, § 6(b). To the extent that Petitioner challenges the facts underlying his conviction for assault and battery on a patient, his arguments are essentially collateral attacks on his conviction; any testimony, even if solicited from Petitioner, would only serve to further his efforts to collaterally attack his conviction. I will decide this case on the written submissions and documentary evidence. *See* Order, § 6(b).

II. Issues

Whether there is a basis for exclusion, and, if so, whether the length of the exclusion that the IG has imposed is mandated by law. 42 C.F.R. § 1001.2007(a)(2).

III. Jurisdiction

I have jurisdiction to decide this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. § 1005.2.

IV. Findings of Fact, Conclusions of Law, and Analysis[6]

1. Petitioner was convicted of assault and battery that was committed on a patient, and the conviction was for a criminal offense relating to the abuse or neglect of a patient in connection with the delivery of a health care item or service and an exclusion from Medicare, Medicaid, and all other federal health care programs for a minimum of five years is warranted.

Section 1128(a)(2) of the Act requires that an individual or entity convicted of "a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service" be excluded from participation in federal health care programs.[7] An individual who is excluded under section 1128(a)(2) must be excluded for a period of not less than five years. 42 U.S.C. § 1320a-7(c)(3)(B).

In July 2014, the State of Michigan charged that Petitioner, on January 3, 2014, committed one felony count of criminal sexual conduct (assault with intent to commit sexual penetration), punishable by up to 10 years imprisonment, and one felony count of

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

[7] While there are slight differences in the wording of Section 1128 of the Act and its codification at 42 U.S.C. § 1320a-7, the two authorities are substantively identical and I refer to them interchangeably. I further note that the Secretary of the Department of Health and Human Services (Secretary) has delegated to the IG the authority "to suspend or exclude certain health care practitioners and providers of health care services from participation in these programs." 48 Fed. Reg. 21,662 (May 13, 1983); *see also* 42 C.F.R. § 1005.1.

criminal sexual conduct, fourth degree (force or coercion), punishable by up to two years of imprisonment. IG Ex. 6. On October 31, 2014, Petitioner, who was represented by counsel, accepted a plea agreement in which he agreed to enter a plea of guilty to assault and battery, a misdemeanor offense punishable by 93 days imprisonment, and that the two felony counts charged by information would be dismissed. IG Ex. 3. Petitioner's written agreement indicates that he would have "no contact [with the] complainant." IG Ex. 3. Petitioner entered a plea of guilty on October 31, 2014, and was sentenced to one year of probation on December 5, 2014. IG Ex. 4.

In his brief, Petitioner explained that "the complainant was a long-time patient." P. Br. Petitioner also acknowledged in his request for hearing that the January 10, 2014 charge of assault and battery followed his medical examination of the victim on January 3, 2014. Request for Hearing. Petitioner reported that "she came to my office and presented with a number of complaints, including heart palpitations, chest pain, abdominal pain, and constant nervousness" and that he "performed a non-eventful exam of her." Request for Hearing. Petitioner reported that "[a]pproximately ten days after she was in my office she made a complaint to the local police that I had assaulted her."[8] P. Br. (emphasis in original). While Petitioner argues in his brief that the evidence does not show that the offense for which he was convicted was committed "during the course of any treatment or patient care," Petitioner has admitted that the charge of assault and battery, to which he ultimately pleaded guilty, stemmed from his examination of this patient. Request for Hearing; *see also* IG Ex. 5 at 4-5 (written statement of victim); IG Ex. 5 at 3 (report of investigative interview of Petitioner in which he admitted that he had examined the victim). Petitioner, as a treating physician, was convicted of the offense of assault and battery of his own patient. IG Ex. 4; Request for Hearing; P. Br.; *see* Michigan Penal Code, § 750.81 stating "[e]xcept as otherwise provided in this section, a person who assaults or assaults and batters an individual, if no other punishment is prescribed by law, is guilty of a misdemeanor . . .)." Thus, at a minimum, a mandatory five-year exclusion is warranted because Petitioner pleaded guilty to committing an assault and battery on a patient during an examination, and therefore his offense involved the abuse of a patient in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(2). *See Clemenceau Theophilus Acquaye*, DAB No. 2745 at 6-7 (2016) (concluding that third-degree criminal sexual contact on a patient warranted exclusion pursuant to section 1128(a)(2)); *Narendra M. Patel, M.D.*, DAB No. 1736 (2000) (concluding that a sexual battery conviction was a criminal offense relating to the abuse of a patient and warranted exclusion pursuant to section 1128(a)(2)).

[8] The victim's written statement indicates that, during a medical appointment with Petitioner on January 3, 2014, Petitioner "put his hands on [her] shoulders," asked the victim "to suck him," "grabbed [her] breasts from under [her] shirt," and "pushed [her] legs open and pulled her off the table and put his hands down [her] pants." IG Ex. 5 at 4.

Petitioner claims that he entered his guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), meaning that he did not admit that he committed the offense but acknowledged that the evidence was sufficient for conviction.[9] P. Br. While Petitioner argues he was not convicted of a criminal offense relating to the abuse of a patient in connection with the delivery of a health care item or service, he is mistaken. I find that Petitioner has been convicted of a criminal offense relating to the abuse of a patient in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a7(a)(2). Petitioner entered a plea of guilty to the charge of assault and battery, and he has admitted that the conviction stems from a medical examination that he conducted on the victim of the crime.

Pursuant to section 1128(i) of the Act, a petitioner is considered to have been convicted of a criminal offense "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court" or if the individual has entered into a first offender, deferred adjudication, or other arrangement or program where judgment of conviction is withheld. 42 U.S.C. § 1320a-7(i)(3),(4). On October 31, 2016, Petitioner accepted a plea agreement offer and admitted guilt to the offense of assault and battery. IG Ex. 4. Even though Petitioner argues that he submitted an *Alford* plea, he nonetheless entered a guilty plea that was accepted by the court. IG Ex. 4. Therefore, pursuant to 42 U.S.C. § 1320a-7(i)(3), Petitioner has a conviction for purposes of exclusion.

While Petitioner disputes his culpability, and in turn, his conviction and the circumstances underlying the offense, he may not do so in this forum.[10] 42 C.F.R. § 1001.2007(d). The Departmental Appeals Board recently summarized its history of declining to review challenges to criminal convictions, stating:

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[9] The Order of Conviction and Sentence does not indicate that the presiding judge accepted an *Alford* plea. A handwritten notation on Form # 71, Settlement Offer and Notice of Acceptance, indicates "no contest." IG Ex. 3.

[10] It is troubling that Petitioner identified the victim of his crime by name on more than one occasion during the course of this appeal. It is further concerning that Petitioner challenged his own criminal conviction by attempting to re-victimize and humiliate his former patient through his discussion of extremely sensitive information of a personal nature. In an apparent effort to discredit his victim, Petitioner disclosed details of the victim's medical diagnoses, treatment history, and personal life. Petitioner presumably only had access to this confidential health care information due to his status as the victim's treating physician, and it is alarming that Petitioner would disclose such information, presumably without the consent of the victim, in an effort to prove that he had not been abusive to the same individual.

> The Board has long held that such "collateral attacks" on the validity of criminal convictions on which exclusions are based are forbidden by regulation. Section 1001.2007(d) states that when an exclusion "is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court" (or "on a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made"), then "the basis for the underlying conviction, civil judgment or determination ***is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal***" (emphasis added). *See, e.g.*, *Michael J. Vogini, D.O.*, DAB No. 2584, at 8 (2014) ("Petitioner pled guilty to and was convicted of Count 14 and may not now collaterally attack that conviction"); *Lyle Kai, R.Ph.*, DAB No. 1979, at 5 (2005) ("'the basis for the underlying conviction . . . is not reviewable and the individual . . . may not collaterally attack it . . . .' 42 C.F.R. § 1001.2007(d)"); *Peter J. Edmonson*, DAB No. 1330, at 4 (1992) . . . . A petitioner who "believes there are serious flaws" in the state's action on which the exclusion is based thus "must challenge it 'in the appropriate forum.'" *Marvin L. Gibbs, Jr., M.D.*[, DAB No. 2279] at 10 [2009], citing *Leonard Friedman, M.D.*, DAB No. 1281 (1991). Per section 1001.2007(d), this is not the appropriate forum for Petitioner to air his grievances about the propriety of his conviction.

Clemenceau Theophilus Acquaye, DAB No. 2745 at 7 (2016). Petitioner has a criminal conviction for assault and battery, and the victim of the crime was a patient undergoing a medical examination. The simple fact is that Petitioner has a criminal conviction for assaulting his own patient, and his abuse of a patient was related to the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(2).

Congress, through enactment of the Act, determined that an individual who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program must be excluded from federal health care programs for no less than five years, and it afforded neither the IG nor an administrative law judge the discretion to impose an exclusion of a shorter duration. 42 U.S.C. § 1320a-7(c)(3)(B). I cannot shorten the length of the exclusion to a period of less than five years because I do not have authority to "[f]ind invalid or refuse to follow Federal statutes or regulations." 42 C.F.R. § 1005.4(c)(1). I therefore agree with the IG that an exclusion for a minimum period of five years is mandated.

V. Effective Date of Exclusion

The effective date of the exclusion, January 19, 2017, is established by regulation, and I am bound by that provision. 42 C.F.R. §§ 1001.2002(b), 1005.4(c)(1).

VI. Conclusion

For the foregoing reasons, I affirm the IG's decision to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years, effective January 19, 2017.

_____/s/_____
Leslie C. Rogall
Administrative Law Judge