Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Debra Lafferty Holiday
(OI File No. H-16-42512-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-491

Decision No. CR4893

Date: July 17, 2017

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Debra Lafferty Holiday, from participation in Medicare, Medicaid, and all other federal health care programs based on Petitioner's conviction of a criminal offense related to the delivery of a health care item or service under Medicare or a state health care program. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner because she was convicted of theft by unlawful taking as a result of a scheme to obtain payments from the Kentucky Medicaid program by submitting false or fraudulent claims for services provided to patients. 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

In a letter dated February 28, 2017, the IG excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Social Security Act (Act) (42 U.S.C. § 1320a-7b(f)) for a minimum period of five

years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1. The IG explained that Petitioner's exclusion was based on a "conviction as defined in section 1128(i) (42 U.S.C. [§] 1320a-7(i)), in the Circuit Court, Court of Justice for Floyd County, Commonwealth of Kentucky, of a criminal offense related to the delivery of a health care 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." IG Ex. 1 at 1. The IG explained that Petitioner was excluded pursuant to section 1128(a)(1) of the Act, which mandates the exclusion of any individual who is convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or any state health care program. 42 U.S.C. § 1320a-7(a)(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).

On April 19, 2017, pursuant to 42 C.F.R. § 1005.6, I presided over a telephonic pre-hearing conference, and the same day I issued an Order and Schedule for Filing Briefs and Documentary Evidence (Order).

Pursuant to my Order, the IG filed an informal brief and a reply brief, along with five exhibits (IG Exs. 1-5). Petitioner, who is represented by counsel, filed an informal brief[1] (P. Br.) and one exhibit.[2] In the absence of any objections, I admit the parties' exhibits into the record.

The IG states that an in-person hearing is not necessary for me to decide this case. IG Br. at 6-7. Petitioner has not indicated whether she desires an in-person hearing, despite being asked to "answer the questions" contained in the short form brief I provided to her.[3] Order, § 5(b.). Further, Petitioner has not availed herself of the opportunity to submit written direct testimony, as discussed in section 5(b.) of my Order. *See Lena Lasher, aka Lena Contang, aka Lena Congtang*, DAB No. 2800 at 4 (2017) (discussing that when

[1] Petitioner did not submit a paginated brief. While not explicitly required by the Civil Remedies Division Procedures or my April 19, 2017 Order, I note that pagination of briefs and other submissions facilitates reference to those filings. Since Petitioner has not paginated her brief, I have not provided pinpoint citations to her brief.

[2] Petitioner did not submit her exhibit in compliance with my Order. The document is not marked as an exhibit, and the submission does not contain markings such as the docket number, exhibit number, and pagination. I have nonetheless admitted Petitioner's submission as P. Ex. 1.

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

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, § 5(b.). In my Order, I 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 . . . will only be held 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 5(c)(iii) of this Order.

Order, § 5(b.). Petitioner's arguments are essentially collateral attacks on her conviction, and any testimony, even if solicited from Petitioner, would only serve to further her efforts to collaterally attack her conviction. *See* P. Br. (stating that "Petitioner plead guilty to billing issues that were the responsibility of others in the clinic . . ." and "[i]n essence she did not commit a criminal act as related to the delivery of services. In reality, this was a mechanism where a civil restitution penalty was made in the context under the criminal court."). I will decide this case on the written submissions and documentary evidence. *See* Order, § 5(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)(1)-(2).

III. Jurisdiction

I have jurisdiction to adjudicate 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[4]

1. Petitioner was convicted of an offense related to the delivery of a health care item or service under a state health care program, which is an offense, pursuant to section 1128(a)(1) of the Act, that subjects her to a mandatory exclusion from all federal health care programs for a minimum of five years.

Section 1128(a)(1) requires a mandatory exclusion from all federal health care programs under certain conditions.[5] Section 1128(a)(1) states:

> (a) Mandatory exclusion
>
> The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> > (1) Conviction of program-related crimes--
> >
> > Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

See 42 U.S.C. § 1320a-7(a)(1).

The IG argues that he properly excluded Petitioner from all federal health care programs based on Petitioner's conviction for an offense that was related to the delivery of a health care item or service under Medicare or a state health care program. IG Br. at 4-5; *see* IG Exs. 2, 5. I find that Petitioner was convicted of a criminal offense, for purposes of the Act, that mandates exclusion from all federal health care programs.

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

[5] 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.

On July 22, 2015, a grand jury returned a true bill of indictment charging that Petitioner committed one count of theft by unlawful taking of $10,000 or more, a class C felony punishable by up to 10 years of imprisonment, and three counts of Kentucky Medical Assistance Program[6] fraud, a class D felony punishable by up to 5 years of imprisonment. IG Ex. 3 at 1-2. Petitioner acknowledged receipt of the Commonwealth of Kentucky's "Offer on a Plea of Guilty" on September 22, 2016 (IG Ex. 4), and entered a plea of guilty to the amended charge of theft by unlawful taking less than $500 that same day. IG Ex. 5 at 1. The Circuit Court for Floyd County, Kentucky, accepted Petitioner's guilty plea and imposed a sentence of 12 months of incarceration, "diverted for twelve (12) months." Petitioner was ordered to pay restitution in the amount of $24,130.13 to the Kentucky Medical Assistance Program. IG Ex. 5 at 4. Petitioner was permitted to enter a Pretrial Diversion Program. IG Exs. 2 at 2; 5 at 2, 4.

Petitioner entered her guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and while she "[did] not admit guilt," she acknowledged that "the evidence against [her] strongly indicates guilt and [her] interests are best served by a guilty plea." IG Ex. 4 at 2. The Commonwealth of Kentucky provided the following proffer of facts in support of its written offer for Petitioner to enter a plea of guilty to a single misdemeanor offense[7]:

> Between the dates of September 11, 2008 and November 12, 2012, in Floyd County Kentucky [Petitioner] as owner of All Family Health Care engaged in a scheme to obtain payments from the Kentucky Medical Assistance Program by submitting false or fraudulent claims for Bioimpedence/ICG tests that were billed but not performed. During the same period of time reference above [Petitioner] engaged in a scheme to obtain payments from the Kentucky Medical Assistance Program by submitting false or fraudulent claims for services provided to patients while there was no medical professional on the staff of All Family Health Care to perform the services. Also, from May 27, 2010 to on or about June 9, 2010 [Petitioner] engaged in a scheme to obtain payments from the Kentucky Medical Assistance Program by submitting false or fraudulent claims. Claims were billed to Medicaid by pharmacies for prescriptions issued on a date where

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[6] The Kentucky Medical Assistance Program is a state health care program, in that it is Kentucky's Medicaid program. Kentucky Revised Statutes (K.R.S.) § 205.8451(6).

[7] The documentary evidence pertaining to Petitioner's conviction does not list the state code provision corresponding to the offense for which Petitioner entered a plea of guilty. The Commonwealth's Offer on a Plea of Guilty indicates that the maximum period of incarceration for the offense of theft by unlawful taking less than $500 is 12 months, and therefore, it is a misdemeanor offense. IG Ex. 2 at 1; *see* K.R.S. § 532.090(1).

> there was no medical professional on the staff of All Family Health Care who could issue the prescription.

IG Ex. 2 at 2.

While Petitioner argues she was not convicted of a criminal offense, I disagree. I find that Petitioner has been convicted of a criminal offense relating to the delivery of an item or service under Medicaid. 42 C.F.R. § 1001.2; *see* IG Ex. 5 at 2; P. Ex. 1. Petitioner entered a plea of guilty to theft by unlawful taking, and the victim of her crime was the Kentucky Medicaid program. IG Ex. 5 at 4 (Order of restitution in the amount of $24,130.13 to the victim, the Kentucky Medical Assistance Program); *see* K.R.S. § 532.356(1)(b) (stating that restitution is paid to a crime victim). 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 September 22, 2016, Petitioner accepted a plea agreement offer and admitted guilt to the offense of theft by unlawful taking less than $500. IG Ex. 5 at 1. Even though Petitioner submitted an *Alford* plea, she nonetheless entered a guilty plea that was accepted by the court. IG Ex. 5. Therefore, pursuant to 42 U.S.C. § 1320a-7(i)(3), Petitioner has a conviction for purposes of exclusion. Further, Petitioner's referral to a Pretrial Diversion Program following her guilty plea has no bearing on her exclusion. 42 U.S.C. § 1320a-7(i)(4).

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

> 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 theft by unlawful taking, and her victim was the Kentucky Medical Assistance Program. While Petitioner claims that her guilty plea was "an effort to resolve the criminal charges" and "[i]n essence she did not commit a criminal act as it related to the delivery of the services," such claims make no difference in this matter. The simple fact is that Petitioner has a criminal conviction for stealing from the Kentucky Medicaid program, and she committed this crime by submitting false claims for reimbursement for services to this program. IG Ex. 2 at 2. As the owner of All Family Health Care who submitted fraudulent claims for items or service to the Kentucky Medical Assistance Program, Petitioner's crime thereby involved the performance of management or administrative services relating to the delivery of items or services to that program. 42 U.S.C. § 1320a-7(a)(1). Petitioner submitted these fraudulent claims "in a scheme to obtain payments" from the state health care program. IG Ex. 2 at 2. Petitioner's *theft* is unquestionably a criminal offense *related* to the delivery of a health care item or service under the Medicare or a State health care program, to include the performance of *management or administrative services* relating to the delivery of items or services in the state Medicaid program. 42 U.S.C. § 1320a-7(a)(1).

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."[8] 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.

[8] Petitioner raises no arguments regarding the length or effective date of the exclusion.

2. The effective date of Petitioner's exclusion is March 20, 2017.

The effective date of the exclusion, March 20, 2017, is 20 days after the date of the IG's February 28, 2017 letter and is established by regulation (42 C.F.R. § 1001.2002(b)); I am bound by that regulation. 42 C.F.R. § 1005.4(c)(1).

V. 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 March 20, 2017.

/s/
Leslie C. Rogall
Administrative Law Judge