Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Desaline Gittens,

Petitioner

v.

The Inspector General.

Docket No. C-11-371

Decision No. CR2404

Date: July 27, 2011

DECISION

Petitioner, Desaline Gittens, is excluded 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)) effective February 20, 2011, based upon her conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

I. Background

The Inspector General (I.G.) for the Department of Health and Human Services (HHS) notified Petitioner by letter dated January 31, 2011, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. The I.G. advised Petitioner that she was being excluded pursuant to section 1128(a)(1) of the Act, based on her conviction in the Kings County Supreme Court of the State of New York of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing on March 30, 2011. The case was assigned to me for hearing and decision. A prehearing telephone conference was convened on April 15, 2011, the substance of which is memorialized in my order of the same date. During the prehearing conference, Petitioner declined to waive an oral hearing, and the I.G. requested to file a motion for summary judgment. Accordingly, I set a briefing schedule for the parties.

The I.G. filed a motion for summary judgment and a supporting brief (I.G. Brief) on May 16, 2011, with I.G. exhibits (I.G. Exs.) 1 through 8. Petitioner filed a brief in opposition to the I.G. motion on June 20, 2011 and a "corrected" brief on June 21, 2011 (P. Brief), with Petitioner exhibits (P. Exs.) 1 through 3. The I.G. filed a reply brief on July 5, 2011. No objections have been made to my consideration of the offered exhibits and all are admitted.

II. Discussion

A. Applicable Law

Petitioner's rights to an administrative law judge (ALJ) hearing and judicial review of the final action of the HHS Secretary (Secretary) are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)).

Pursuant to section 1128(a)(1) of the Act, the Secretary 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. Pursuant to section 1128(i) of the Act, an individual is 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) the individual has entered into any arrangement or program where judgment of conviction is withheld.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. 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.

Petitioner bears the burden of going forward with the evidence and the burden of persuasion on any affirmative defenses or mitigating factors. The I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b) and (c). The burden of persuasion is judged by a preponderance of the evidence. 42 C.F.R. §§ 1001.2007(c), 1005.15(d). Petitioner may not in this forum, obtain review of, or collaterally attack on procedural or substantive grounds, a criminal conviction or civil judgment of a federal, state, or local court or another government agency that is cited as the basis for exclusion. 42 C.F.R. § 1001.2007(d).

B. Issue

The Secretary has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and
>
> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioner's request for hearing was timely, and I have jurisdiction.

2. Summary judgment is appropriate in this case.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by

42 C.F.R. § 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate, and no hearing is required where either: there are no disputed issues of material fact, and the only questions that must be decided involve application of law to the undisputed facts; or the moving party prevails as a matter of law, even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts that, if true, would refute the facts that the moving party relied upon. *See, e.g.*, .Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (finding in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Life Plus Ctr.*, DAB CR700 (2000); *New Millennium CMHC*, DAB CR672 (2000).

There is no dispute that Petitioner was convicted of a criminal offense. Whether Petitioner was convicted of an offense related to the delivery of an item or service under Medicare or Medicaid, is a mixed question of law and fact. However, there is no genuine dispute as to the facts that could result in a favorable decision for Petitioner, and the issue of law that Petitioner raised must be resolved against her. Accordingly, summary judgment is appropriate.

3. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

Petitioner states in her brief that she was an employee of "Holistic Home Care," a Brooklyn based home care agency from around May 8, 2006 to about August 21, 2006. Petitioner contends that she never held herself out as being able to practice the profession of nursing nor did she know that her employer billed the State of New York Department of Health for her services. P. Brief at 3. The New York Medicaid Fraud Control Unit, an Office of the Attorney General of the State of New York, initiated an investigation of Holistic Home Care. On December 2, 2008, Petitioner was indicted on charges of grand larceny in the third degree and the unauthorized practice of nursing, both felonies. I.G. Ex. 3; I.G. Ex. 4.

On February 9, 2009, Petitioner signed a "Plea and Cooperation Agreement" (Plea Agreement) in which she agreed to plead guilty to the offense of criminal trespass in the second degree, a misdemeanor. I.G. Ex. 7, at 1. In exchange for her plea, Petitioner received the agreement of the New York Medicaid Fraud Control Unit not to proceed on the greater charges from the indictment. I.G. Ex. 2; I.G. Ex. 7, at 3. Petitioner agreed that her sentence would be limited to a conditional discharge and to pay criminal restitution in the amount to $9,180 to the New York State Medicaid Fraud Restitution Fund over a period of three years. I.G. Ex. 7, at 3. On February 9, 2010, Petitioner was

convicted pursuant to her guilty plea of one count of criminal trespass in the second degree in the Supreme Court of New York, Kings County. I.G. Ex. 5. Petitioner pled guilty to the following offense as read on the record by the judge:

> [O]n or about May 9, 2006 to on or about August 21, 2006, in the County of Kings, State of New York, you did enter and remain unlawfully in the dwellings of Medicaid Recipients Elijah Wallace and Michael Marinov, resulting in $9,180 in damages to the New York State Medicaid program.

I.G. Ex. 6, at 7. Petitioner was sentenced to conditional discharge of one year and ordered to pay restitution of $9,180 to the New York State Medicaid Fraud Restitution Fund, consistent with her Plea Agreement. I.G. Ex. 5; I.G. Ex. 7, at 3.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

> (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.

The statute requires that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a criminal offense, whether a felony or a misdemeanor; (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program.

Petitioner does not dispute that she was convicted, within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), of a criminal offense. Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when: a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; there has been a finding of guilt in a federal, state, or local court; a plea of guilty or no contest has been accepted in a federal, state, or local court; or an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Petitioner was clearly convicted within the meaning of section 1128(i) of the

Act, when her guilty plea was accepted, and a judgment was entered finding her guilty of criminal trespass in the second degree.[2] I.G. Exs. 5, 8.

Petitioner disputes that she was convicted of an offense related to the delivery of an item or service under the New York State Medicaid program. P. Brief at 4. However, Petitioner does not dispute the following facts: she admitted by her guilty plea to entering and remaining unlawfully in the dwellings of Medicaid recipients; she admitted by her guilty plea that she caused $9,180 in damages to the New York State Medicaid program; she agreed to pay restitution to the New York State Medicaid Fraud Restitution Fund; and she was prosecuted by the New York Medicaid Fraud Control Unit (P. Ex. 7, at 5). Petitioner does not dispute that at the time of her trespass in the dwellings of the Medicaid recipients that she was an employee of Holistic Home Care Agency and that she was present in that capacity.[3] Petitioner presents no evidence to establish a genuine dispute as to the material issue of fact of whether her presence in the dwelling of the Medicaid recipients was for the purpose of delivering an item or service.

In determining whether a conviction is program-related within the meaning of section 1128(a)(1) of the Act, I may look beyond both the language of the statute under which she was convicted and the precise wording of her plea. An offense is related to the delivery of an item or service under Medicare of 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). I conclude, based upon the undisputed and admitted facts, that there is a nexus or common sense connection between the Petitioner's criminal offense and the delivery of an item or service under Medicare or Medicaid. *Timothy Wayne Hensley*, DAB No. 2044 (2006); *Neil Hirsch, M.D.*, DAB No. 1550 (1995); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993). Accordingly, I conclude that the offense of which Petitioner was convicted was related to the delivery of an item or service under the New York Medicaid program, and the elements necessary for exclusion pursuant to section 1128(a) of the Act are satisfied.

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[2] Petitioner was convicted of a misdemeanor (I.G. Ex. 2, at 1), but that has no impact upon exclusion pursuant to section 1128(a)(1) of the Act.

[3] Petitioner expresses concern that the I.G. alleges that Petitioner held herself out to be a licensed professional nurse but there is no evidence to support that allegation. P. Brief at 4. Whether or not Petitioner represented to someone that she was a licensed professional nurse, is not a fact material to my decision in this case.

Petitioner argues that she should not be excluded without a showing that she is untrustworthy. Petitioner argues a number of factors to show that she should not be considered untrustworthy, including: her offense does not establish her untrustworthiness; her sentence involved no custody or supervision; her Certificate of Relief from Disabilities issued by the judge who convicted and sentenced her (P. Ex. 1)[4]; her removal from the New York Medicaid disqualified provider list (P. Ex. 2); and since October 2007, Petitioner has been working as a registered nurse and she is a valued staff member (P. Ex. 3). However, section 1128(a)(1) of the Act permits no consideration of whether or not one is trustworthy. Congress requires that the Secretary exclude from Medicare anyone convicted of a criminal offense, whether a felony or a misdemeanor, that is related to the delivery of an item or service under Medicare or a state health care program.

There is a basis for Petitioner's exclusion, and her exclusion is mandated by section 1128(a)(1) of the Act.

4. Pursuant to section 1128(c)(3)(B) of the Act, five years is the minimum period of exclusion pursuant to section 1128(a) of the Act.

5. Petitioner's exclusion for five years is not unreasonable as a matter of law.

Five years is the minimum authorized period for a mandatory exclusion pursuant to section 1128(a). Act § 1128(c)(3)(B). I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a) of the Act, and the minimum period of exclusion is five years and that period is not unreasonable as a matter of law.

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[4] Petitioner does not argue that the certificate bars her exclusion or that it should be considered when determining the length of her exclusion. However, had she made such arguments I would find the rationale in *Bhupendra Patel, M.D.*, DAB No. 1370 (1992) and *Janet Wallace, L.P.N.*, DAB No. 1326 (1992) persuasive and I would reject the arguments.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years effective February 20, 2011.

/s/
Keith W. Sickendick
Administrative Law Judge