

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Patricia Marie Meade,
(O.I. File Number 7-10-40357-9),

Petitioner

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-11-834

Decision No. CR2497

Date: January 30, 2012

DECISION

Petitioner, Patricia Marie Meade, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(4)), effective August 18, 2011, based upon her conviction of a felony criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. There is a proper basis for exclusion. Petitioner's exclusion for 10 years* is mandatory pursuant to section 1128(c)(3)(G)(i) of the Act (42 U.S.C. § 1320a-7(c)(3)(G)(i)) because Petitioner was convicted on a previous occasion of an offense for which an exclusion may be effected under section 1128(a).

* 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 July 29, 2011, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 10 years. The I.G. advised Petitioner that she was being excluded pursuant to section 1128(a)(4) of the Act, based on her conviction in the United States District Court, Southern District of Iowa, of a criminal offense, as defined under federal or state law, related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The I.G. further advised Petitioner that the 10-year period of exclusion was mandatory under section 1128(c)(3)(G)(i) of the Act because Petitioner had been convicted of two offenses for which exclusion could be effected under section 1128(a) of the Act. The I.G. cited Petitioner's federal conviction in 2000 of conspiracy to manufacture and attempting to manufacture methamphetamine. I.G. Exhibit (I.G. Ex.) 1.

Petitioner requested a hearing by undated letter that was postmarked September 24, 2011, and received at the Civil Remedies Division of the Departmental Appeals Board on September 29, 2011. The case was assigned to me for hearing and decision on September 30, 2011. A prehearing telephone conference was convened on October 20, 2011, the substance of which is memorialized in my order of October 24, 2011. During the prehearing conference, Petitioner waived an oral hearing, and the parties agreed that the matter could be resolved based on the parties' briefs and documentary evidence. I set a briefing schedule.

The I.G. filed a brief (I.G. Br.) on November 21, 2011, with I.G. Exs. 1 through 11. Petitioner filed her brief in opposition (P. Br.) on December 22, 2011, with Petitioner's exhibits (P. Exs.) 1 through 8. The I.G. filed a reply brief (I.G. Reply) on January 5, 2012, with I.G. Ex. 12. No objection has been made to my consideration of I.G. Exs. 1 through 12 and P. Exs. 1 through 8, and they are admitted.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner with rights to an Administrative Law Judge (ALJ) hearing and judicial review of the final action of the HHS Secretary (Secretary). The right to hearing before an ALJ is set forth in 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). In this case, Petitioner waived an oral hearing, and the parties agreed to and have submitted only documentary evidence and written argument for my consideration.

Pursuant to section 1128(a)(4) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted for an offense that occurred after August 21, 1996, under federal or state law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), 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.

Exclusion for a minimum period of five years is mandatory for any individual or entity convicted of a criminal offense for which exclusion is required by section 1128(a) of the Act. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). However, if an excluded individual has “been convicted on one previous occasion of one or more offenses for which an exclusion may be effected,” a 10-year exclusion is mandated. Act § 1128(c)(3)(G)(i); 42 C.F.R. § 1001.102(d)(1). Pursuant to 42 C.F.R. § 1001.102(b), an individual’s 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, however, are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years or 10 years in this case. 42 C.F.R. § 1001.102(c). The I.G. does not cite any aggravating factors in this case and asserts that a 10-year exclusion is mandated because Petitioner was convicted on a previous occasion of one or more offenses for which an exclusion may be effected. Thus, I cannot consider mitigating factors to reduce Petitioner’s period of exclusion in this case.

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), (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 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 in this forum 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 is timely, and I have jurisdiction.

2. There is a basis to exclude Petitioner pursuant to section 1128(a)(4) of the Act.

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

The I.G. cites section 1128(a)(4) 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)):

. . . (4) FELONY CONVICTION RELATING TO CONTROLLED SUBSTANCE.—Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

The statute requires that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a felony criminal offense under federal or state law; (2) where the offense occurred after August 21, 1996, the date of enactment of the Health Insurance Portability and Accountability Act of 1996; and (3) the criminal offense relates to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

There is a basis for Petitioner's exclusion. Petitioner does not dispute that: on March 27, 2008, her guilty plea to one count of distribution on about April 16, 2007 of at least five grams of methamphetamine, a controlled substance, was accepted by the United States District Court, Southern District of Iowa; that a judgment of conviction and sentence was

entered by the court on April 23, 2010; or that the offense of which she was convicted was a felony. There is no dispute that the acceptance of Petitioner's guilty plea and the entry of a judgment of conviction was a conviction within the meaning of section 1128(i) of the Act. I.G. Exs. 2-6; P. Ex. 8; P. Br. at 2.

I conclude that the elements of section 1128(a)(4) of the Act are satisfied, and Petitioner's exclusion is required.

3. Pursuant to section 1128(c)(3)(G)(i) of the Act, a 10-year period of exclusion is mandatory.

4. A 10-year period of exclusion is not unreasonable in this case as a matter of law. Act § 1128(c)(3)(G)(i).

Congress requires that an individual or entity excluded pursuant to section 1128(a) of the Act be excluded for no fewer than five years. Act § 1128(c)(3)(B). Congress also requires that an individual who is excluded pursuant to section 1128(a) of the Act be excluded for 10 years if the individual has a prior conviction for an offense that would trigger exclusion under section 1128(a). Act § 1128(c)(3)(G)(i). Petitioner does not dispute that she was previously convicted on May 22, 2000 in the United States District Court, Northern District of Iowa, of the felony offense of conspiracy to manufacture and attempt to manufacture methamphetamine in June 1999. I.G. Ex. 7-10; P. Br. at 2. Accordingly, her exclusion for 10 years is mandated by Congress and not unreasonable as a matter of law.

Petitioner argues that a 10-year period of exclusion is unreasonable. P. Br. at 2, 5. Petitioner urges me to consider that: she has suffered from the disease of addiction and has a family history of addiction; she has been in recovery for four years and participated successfully in a drug abuse program while incarcerated; it is unfair to exclude her for 10 years because her first conviction occurred 11 years ago; her criminal offenses were committed while she was "active in [her] addiction"; her drug convictions had nothing to do with theft or fraud; she has been a registered nurse for over 25 years and has been a good nurse and mother; her only career has been nursing and she needs to work as a nurse to support herself and her children; she assisted federal and local authorities in the investigation and prosecution of other individuals and was granted a sentence reduction due to her assistance; and she has been able to retain her nursing license. P. Br. I have no authority to reduce Petitioner's period of exclusion based on any of her arguments. The I.G. has not cited any aggravating factors to extend Petitioner's period of exclusion beyond the minimum required by law, and I have no authority to reduce the period of exclusion below 10 years. 42 C.F.R. §§ 1001.102(c) and (d), 1005.4.

Petitioner also argues that the effective date of her exclusion is unfair, in that it should have begun on March 27, 2008, the date her guilty plea was accepted. Petitioner's

