Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sirri A. Nomo-Ongolo, M.D.

(OI File No. H-16-41553-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-291

Decision No. CR4888

Date: July 10, 2017

DECISION

Petitioner, Sirri A. Nomo-Ongolo, M.D., is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(5) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(5)) and 42 C.F.R. § 1001.601,[1] effective December 20, 2016, based upon her voluntary withdrawal from participation in the Minnesota Health Care Program (the state program) to avoid a formal sanction within the meaning of 42 C.F.R. § 1001.601(a)(2). There is a proper basis for exclusion. Petitioner's exclusion for the period during which she is excluded from participation in the state program is mandated by section 1128(c)(3)(E) of the Act (42 U.S.C. § 1320a-7(c)(3)(E)) and 42 C.F.R. § 1001.601(b)(1).

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[1] References are to the 2016 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated November 30, 2016, that she was excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(5) of the Act. The I.G. advised Petitioner that her exclusion was effective 20 days from the date of the notice letter and that the exclusion would continue until such time as Petitioner is reinstated by the state program. I.G. Exhibit (Ex.) 1 at 1. The I.G. alleges as the basis for exclusion pursuant to section 1128(b)(5) of the Act that Petitioner was "suspended, excluded or otherwise sanctioned [by the state program] . . . for reasons bearing on [her] professional competence, professional performance or financial integrity." I.G. Ex. 1 at 1.

Petitioner filed a request for hearing on January 18, 2017, with multiple attachments. The case was assigned to me on January 30, 2017, for hearing and decision. A prehearing telephone conference was convened on February 13, 2017, the substance of which is memorialized in my order dated February 13, 2017.

The I.G. filed a motion for summary judgment and a supporting brief (I.G. Br.) on March 30, 2017, with I.G. Exs. 1 through 8. On May 15, 2017, Petitioner filed a cross-motion for summary judgment and her response to the I.G.'s motion for summary judgment (P. Br.) with her affidavit, which I treat as if marked Petitioner's Exhibit (P. Ex.) 1. On May 30, 2017, the I.G. filed a reply brief. Petitioner filed a motion for leave to file a sur-reply brief on June 14, 2017, with a copy of the sur-reply. Petitioner's motion is granted for good cause and the sur-reply is accepted.

Petitioner has not objected to my consideration of I.G. Exs. 1 or 3 through 8, and they are admitted as evidence. The I.G. did not object to my consideration of P. Ex. 1, and it is admitted as evidence. Petitioner objects to the admissibility of I.G. Ex. 2, the state program notice of termination letter, asserting it is unreliable hearsay. P. Br. at 10–11. Petitioner's objection is overruled. An ALJ determines the admissibility of evidence and is not bound by the Federal Rules of Evidence. 42 C.F.R. § 1005.17(a)–(b). Irrelevant or immaterial evidence, including evidence which cannot be authenticated, must be excluded. 42 C.F.R. § 1005.17(c). An ALJ has the discretion to exclude unreliable evidence. 42 C.F.R. § 1005.17(b). Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion, undue delay, or presentation of cumulative evidence. 42 C.F.R. § 1005.17(d). The authenticity and relevance of I.G. Ex. 2 is not questioned. Petitioner argues that I.G. Ex. 2 is unreliable hearsay because it does not include any findings of fact and the letter was superseded by subsequent events. P. Br. at 10. Petitioner is correct that the letter does not reflect findings and conclusions by the state program on Petitioner's appeal of the state program termination action. The letter is a notice to Petitioner that the state program intended to terminate Petitioner's participation in that program based on certain allegations that

Petitioner received impermissible direct payments from state program beneficiaries. The letter gives Petitioner notice of her right to appeal the action, the procedures for appeal, and the effect of failure to appeal. Petitioner does not deny that she received the notice or that she subsequently exercised her right to appeal the state program termination. In fact, Petitioner admits to receiving the notice and exercising her rights. P. Ex. 1 ¶ 6, 8-11. I conclude that Petitioner's hearsay objection goes to the weight to be accorded to the letter and is not a basis for exclusion of the exhibit. I also conclude that the letter is no more prejudicial than probative on the issue of whether or not a state program termination action was initiated, which Petitioner contested by requesting an appeal in the manner described by the letter. I.G. Ex. 2 is not cumulative of P. Ex. 1 or other evidence. I.G. Ex. 2 is admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(b)(5) of the Act provides:

> (b) Permissive Exclusion.—The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> * * * *
>
> (5) Exclusion or suspension under federal or state health care program.—Any individual or entity which has been suspended or excluded from participation, or otherwise sanctioned, under—
>
> (A) any Federal program, including programs of the Department of Defense or the Department of Veterans Affairs, involving the provision of health care, or
>
> (B) a State health care program,
>
> for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

The Secretary of the Department of Health and Human Services (the Secretary) has promulgated regulations at 42 C.F.R. pt. 1001 implementing section 1128 of the Act as required by section 1102 of the Act (42 U.S.C. § 1302). The Act does not define the phrase 'otherwise sanctioned' used in section 1128(b)(5) of the Act. However, the Secretary has specifically defined "otherwise sanctioned" in the regulations as follows:

> (a) *Circumstance for exclusion*. (1) The OIG may exclude an individual or entity suspended or excluded from participation, or otherwise sanctioned, under—
>
> > (i) Any Federal program involving the provision of health care, or
> >
> > (ii) A State health care program, for reasons bearing on the individual's or entity's professional competence, professional performance or financial integrity.
>
> (2) The term "or otherwise sanctioned" in paragraph (a)(1) of this section is intended to cover all actions that limit the ability of a person to participate in the program at issue regardless of what such an action is called, and **includes situations where an individual or entity voluntarily withdraws from a program to avoid a formal sanction.**

42 C.F.R. § 1001.601(a) (italics in original, emphasis added).

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

The standard of proof is a preponderance of the evidence. 42 C.F.R. § 1001.2007(c). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

B. Issues

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). However, whether or not the length of exclusion is unreasonable is not an issue in this case, as the length of exclusion is specified by Congress and the Secretary. Act § 1128(c)(3)(E); 42 C.F.R. § 1001.601(b).

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.

Petitioner's request for hearing was timely filed and preserved Petitioner's right to review of justiciable issues. 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 Secretary has provided by regulation that a sanctioned party has the right to hearing before an ALJ and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2, 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 which, if true, would refute the facts relied upon by the moving party. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997) (holding 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 Millennium CMHC*, DAB CR672 (2000); *New Life Plus Ctr.*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. The only issues that require resolutions are issues of law that must be resolved against Petitioner. I conclude that summary judgment in favor of the I.G. is appropriate.

3. There is a basis to exclude Petitioner pursuant to section 1128(b)(5) of the Act and 42 C.F.R. § 1001.601.

a. Facts

On January 13, 2015, the state program notified Petitioner by letter that her participation in the state program would be terminated effective 30 days from the date of the letter, unless Petitioner requested an appeal. The state program alleged in its notice that

Petitioner requested and received prohibited direct payments from program recipients for services covered by the program. I.G. Ex. 2 at 1.

Petitioner concedes that she received notice of the state program termination action and the alleged basis for that action. She denies ever receiving direct payments from patients. Petitioner concedes she appealed the termination action by letter dated February 2, 2015. Petitioner admits that on June 29, 2015, the day before her appeal hearing, she agreed to voluntarily withdraw from the state program in exchange for the termination action being dropped and her appeal dismissed. On July 9, 2015, the state program notified Petitioner that her participation in that program was terminated because her appeal was dismissed. P. Ex. 1 at ¶¶ 6-15; I.G. Ex. 4-8. I accept these facts as true for purposes of summary judgment and draw all inferences favorable to Petitioner.

b. Analysis

Pursuant to section 1128(b)(5) of the Act, the Secretary may exclude from participation in Medicare or other federal health care program, any individual or entity: (1) suspended, excluded, or otherwise sanctioned under any federal or state health care program; (2) for reasons bearing upon the individual's or entity's professional competence, professional performance, or financial integrity. The Secretary has specified by regulation that the phrase "otherwise sanction" includes the situation "where an individual or entity voluntarily withdraws from a program to avoid a formal sanction." 42 C.F.R. § 1001.601(a)(2).

In this case, there is no dispute that the state program qualifies as a state health care program within the meaning of section 1128(h) of the Act. There is no dispute that the state program initiated an action to terminate Petitioner's participation in that program. The state program alleged as the basis for the termination that Petitioner received prohibited direct payments from patients for services delivered to program beneficiaries, which Petitioner denies. There is no dispute that Petitioner appealed the termination action as was her right. There is no dispute that the day before her appeal hearing, Petitioner voluntarily withdrew from the state program and agreed to drop her appeal, which she believed would result in the termination action being dropped. I conclude as a matter of law that the undisputed facts are sufficient to establish the "common sense" connection or nexus between the state program termination action and the allegations of receiving prohibited direct payments, which is clearly an attack upon and related to Petitioner's financial integrity. *George Iturralde, M.D.*, DAB No. 1374 at 10-11 (1992). I further conclude as a matter of law that Petitioner's voluntary withdrawal of her appeal of the state program termination action and her voluntary withdrawal from the state program were with the intent to avoid further proceedings and a formal sanction as she states in her affidavit, P. Ex. 1 at ¶¶ 11-13; P. Br. at 8. Accordingly, there is a basis for the exclusion of Petitioner pursuant to section 1128(b)(5) of the Act and 42 C.F.R. § 424.1001.601. *Juddy Pederson Rogers & William Ernest Rogers*, DAB No. 2009

(2006). I do not have authority to review the I.G.'s exercise of discretion to exclude pursuant to section 1128(b) when I conclude that there is a basis for exclusion. 42 C.F.R. § 1005.4(c)(5).

Petitioner asserts the exclusion by the I.G. violates constitutional due process on grounds that Petitioner had no notice that her agreement to voluntarily withdraw from the state program under the circumstance could result in her exclusion from federal health care programs. P. Br. at 13–15. Petitioner's argument is without merit. Section 1128(b) of the Act and 42 C.F.R. § 1001.601 clearly give notice that, on the facts of this case, Petitioner was subject to permissive exclusion by the I.G. Petitioner's agreement to withdraw her appeal of the state termination action without the advice and assistance of counsel and the protection of a properly executed settlement agreement was ill advised. But Petitioner's bad choices are no bar to permissive exclusion by the I.G. I have the responsibility to enforce regulations consistent with the Constitution, the Act, and the Secretary's regulations. I have no authority to fashion a remedy to address the underlying state program action or the effect of Petitioner's agreement with the state. My authority is only that which has been delegated to me by the Secretary. I am bound by applicable laws and regulations and have no authority to declare a federal statute or regulation unconstitutional or to set aside a state action on constitutional grounds. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Sentinel Med. Labs., Inc*., DAB No. 1762 (2001), *aff'd sub nom., Teitelbaum v. Health Care Fin. Admin*., No. 01-70236 (9th Cir. Mar. 15, 2002), *reh'g denied*, No. 01-70236 (9th Cir. May 22, 2002).

4. The period of exclusion is not unreasonable as a matter of law.

In this case, there is no issue as to the reasonableness of the period of exclusion, as it is fixed by the Act and regulations. The Act and regulations mandate that the period of exclusion under section 1128(b)(5) will be not less than the period of exclusion from the state health care program.[2] Act § 1128(c)(3)(E); 42 C.F.R. § 1001.601(b)(1). Accordingly, the exclusion of Petitioner until she is reinstated in the state program is not unreasonable as a matter of law.

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[2] Petitioner's reinstatement in Medicare or other federal programs is not automatic. If Petitioner is reinstated into MHCP, she must apply to the I.G. for reinstatement. 42 C.F.R. §§ 1001.3001-.3004.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs effective December 20, 2016, twenty days after the November 30, 2016 I.G. notice of exclusion. The period of exclusion is not less than the period during which Petitioner is excluded from the state program.

/s/
Keith W. Sickendick
Administrative Law Judge