Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gena C. Randolph,
(OI File No. H-12-42170-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-388

Decision No. CR2799

Date: May 24, 2013

DECISION

The Inspector General (I.G.) of the U.S. Department of Health and Human Services notified Gena C. Randolph (Petitioner) that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years pursuant to section 1128(a)(1) of the Social Security Act, 42 U.S.C. § 1320a-7(a)(1). I find that the I.G. has a basis for excluding Petitioner and that the five-year exclusion is mandated as a matter of law.

I. Background

By letter dated January 31, 2013, the I.G. notified Petitioner that she was being excluded from Medicare, Medicaid, and all federal health care programs for a minimum period of five years pursuant to section 1320a-7(a)(1). I.G. Ex. 1. The I.G. advised Petitioner that the exclusion was based on her conviction "in the Court of General Sessions, State of South Carolina, Charleston County, of a criminal offense related to the delivery of an 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." I.G. Ex. 1, at 1.

Petitioner timely filed her February 5, 2013 request for hearing (RFH), and this case was assigned to me for hearing and decision. On February 22, 2013, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order). *See* 42 C.F.R. § 1005.6(c).

Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on March 25, 2013, with I.G. exhibits (I.G. Exs.) 1 through 4. On March 25, 2013, Petitioner also filed her brief (P. Br.). Absent objection, I admit I.G. Exs. 1 through 4 into the record. Petitioner did not file any proposed exhibits with her brief. However, Petitioner submitted supporting documents with her hearing request and refers to those documents in her brief. *See* DAB E-file Record Document # 1 ("OIG Appeal Documents"); P. Br. at 1. I find, as explained more fully below, that Petitioner offers the documents in support of an impermissible collateral attack on the underlying conviction. *See* 42 C.F.R. § 1001.2007(d). Therefore, the documents are irrelevant, and I must exclude them from the record. 42 C.F.R. § 1005.17(c).

On April 5, 2013, the I.G. filed its reply brief (I.G. Reply). Later on that same date, Petitioner filed an "Objection and Motion to Strike the I.G.'s Reply Brief" (Motion to Strike). On April 7, 2013, Petitioner also filed an "Objection to Material Facts Asserted in the I.G.'s Short Form Brief and Reply Brief" (Objection). The I.G. did not file a response to either Petitioner's Motion to Strike or Objection to Material Facts.

II. Rulings on Outstanding Motions

On April 5, 2013, Petitioner filed an Objection and Motion to Strike the I.G.'s Reply Brief. Petitioner's argument in opposition to the admission of the I.G.'s Reply Brief is that the cases cited in the brief are irrelevant. Motion to Strike at 1. Petitioner further contends that the Reply should be stricken because it fails to offer any evidence that the plea agreement was entered into without undue influence and coercion, and it fails to address Petitioner's constitutional and due process arguments. *Id.* at 1-2.

I deny Petitioner's Motion to Strike because there is no basis to strike the I.G.'s Reply Brief from the record. Contrary to Petitioner's view, the I.G. does respond to the arguments Petitioner raised in her brief. The I.G.'s response is that Petitioner's arguments are impermissible collateral attacks on the underlying conviction. I.G. Reply at 1-2. Accordingly, because the cases cited by the I.G. in its Reply Brief support its legal argument, the cases are relevant. Finally, the I.G. is not required to provide evidence regarding the circumstances surrounding the plea agreement because the underlying conviction is not reviewable. *See* 42 C.F.R. § 1001.2007(d). Thus, there is no basis to strike the I.G.'s Reply Brief from the record.

Petitioner also objects to the plea agreement and the state court's judgment, and she asks that I strike them from the record. Objection at 1. Petitioner contends that I should strike the plea agreement from the record because the I.G. failed to provide any documentary evidence that shows Petitioner voluntarily entered into the plea agreement. In a similar vein, Petitioner argues the state court's judgment should be stricken because the I.G. failed to provide evidence to refute her assertion that the judge accepted her plea based on perjured testimony. I overrule Petitioner's objections. Both the plea agreement and state court's judgment are relevant to show whether there is a basis for Petitioner's exclusion. As addressed below, the I.G. is not required to provide evidence regarding the circumstances surrounding the plea agreement or state court's judgment and failure to provide such evidence is therefore not a basis to exclude these documents. As such, I find that both documents are relevant and supported by the record, and I have no basis to strike them from the record.

III. Decision on the Written Record

Both parties indicated in their exchanges that an in-person hearing was unnecessary and that neither party had any witnesses to offer. I.G. Br. at 7; P. Br. at 3. Therefore, the record is now closed, and I decide this case based on the written record.

IV. Issue

Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1). Because exclusion under section 1320 a-7(a)(1) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

V. Findings of Fact and Conclusions of Law

The Secretary of the U.S. Department of Health and Human Services must exclude an individual from participation in any federal health care program if that individual has been convicted of a criminal offense related to the delivery of an item or service under title XVIII of the Social Security Act (42 U.S.C. § 1395 *et seq.*) or under any state health care program. 42 U.S.C. § 1320a-7(a)(1).

A. Petitioner pleaded guilty in the Court of General Sessions in the State of South Carolina to one count of Medical Assistance Provider Fraud.

Petitioner is a speech therapist in South Carolina. On July 10, 2012, Petitioner entered into a plea agreement with the State of South Carolina agreeing to "waive presentment and plead guilty to one (1) indictment which charged Defendant with Filing False Claims with the South Carolina Medicaid Program in violation of § 43-7-60(B), S.C. Code of

Laws, 1976, as amended." I.G. Ex. 3, at 1. On August 15, 2012, Petitioner entered a guilty plea to the one count indictment. I.G. Ex. 4. Specifically, Petitioner pleaded guilty to:

> [K]nowingly and willfully fil[ing], or caus[ing] to be filed, false claims for speech therapy under Current Procedure Terminology Code 92507 for Medicaid recipient C.J. with the South Carolina Department of Health and Human Services. These claims were false because the services that were billed for were not provided.

I.G. Ex. 4, at 2.

On August 15, 2012, the state court judge accepted Petitioner's guilty plea and sentenced Petitioner to probation for five years and ordered restitution in accordance with the plea agreement. I.G. Ex. 2.

B. Petitioner was convicted of a criminal offense for purposes of 42 U.S.C. § 1320a-7(a)(1).

Under 42 U.S.C. § 1320a-7(a)(1), Petitioner must be "convicted of a criminal offense." For the purposes of a violation under 42 U.S.C. § 1320a-7(a)(1), the term "convicted" includes "when a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court." 42 U.S.C. § 1320a-7(i)(3); *see also* 42 C.F.R. § 1001.2. Considering Petitioner's guilty plea, I find that the record supports the finding that Petitioner was convicted within the meaning of the statute.

Petitioner nevertheless claims that she has not been convicted of a criminal offense because the plea agreement is invalid. P. Br. at 1-2. Petitioner claims that the plea agreement is a product of coercion, undue influence and prosecutorial misconduct. Petitioner also raises procedural and due process concerns in her hearing request. RFH at 1. It is well-established that "constitutional arguments about the process leading to a state criminal conviction are not relevant in determining whether the I.G. has authority to exclude a petitioner." *Chander Kachoria, R. Ph.*, DAB No. 1380 (1993) (citing *David S. Muransky, D.C.*, DAB No. 1227 (1991)). Moreover, the regulations explicitly preclude any collateral attack on Petitioner's conviction:

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

42 C.F.R. § 1001.2007(d); *see also Emmanuel Uko Akpan*, DAB No. 2330, at 8 (2010) (rejecting Petitioner's argument that his guilty plea was not a proper basis for his exclusion because the guilty plea was based on coercion, threats, promises, conflicts of interests and misrepresentation).

Therefore, the alleged circumstances surrounding the plea agreement cannot serve as a basis to reverse the exclusion, and I find that Petitioner was convicted of a criminal offense within the meaning of 42 U.S.C. § 1320a-7(a)(1).

C. Petitioner's conviction requires exclusion under 42 U.S.C. § 1320a-7(a)(1) because her criminal conduct related to the delivery of an item or service under Medicaid.

An individual must be excluded from participation in any federal health care program if the individual was convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. 42 U.S.C. § 1320a-7(a)(1). In the present case, the record fully supports this conclusion. Petitioner pleaded guilty to one count of Medical Assistance Provider Fraud. The indictment makes it clear that Petitioner "knowingly and willfully filed, or caused to be filed, false claims for speech therapy . . . for Medicaid recipient C.J. with the South Carolina Department of Health and Human Services (SCDHHS)." I.G. Ex. 4, at 2. SCDHHS administers the state's Medicaid program. Medicaid is a "State health care program" for exclusion purposes. 42 C.F.R. § 1001.2. Therefore, Petitioner's conviction is related to the delivery of services under a State healthcare program.

I conclude that the record fully supports Petitioner's mandatory exclusion under 42 U.S.C. § 1320a-7(a)(1).[1]

[1] Throughout these proceedings, Petitioner has also requested other forms of relief. Specifically, Petitioner seeks data suppressed in the National Practitioner Data Bank and compensatory and punitive damages. RFH at 2; P. Br. at 3. The scope of the issues an Administrative Law Judge (ALJ) may review is limited by regulation. 42 C.F.R. § 1001.2007(a)(1); *see also* 42 C.F.R. § 1005.4 (authority of an ALJ). Thus, in the present matter, the only issue I may consider is whether the basis for the imposition of the exclusion exists. I do not have the authority to provide the relief Petitioner seeks.

D. Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B).

Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(1), Petitioner must be excluded for a mandatory minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

VI. Conclusion

For the foregoing reasons, I sustain the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for the statutory five-year minimum period pursuant to 42 U.S.C. § 1320a-7(a)(1), (c)(3)(B).

_____/s/_____
Joseph Grow
Administrative Law Judge