Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	Date: February 10, 2009
Khristiane Nicholas Lagua Caraang a.k.a. Khristianeni Lagua Caraang a.k.a. Khristian Caraang (O.I. File No. L-07-40577-9),	)	Docket No. C-08-733
	)	Decision No. CR1898
Petitioner,	)	
-v.-	)	
The Inspector General.	)	

DECISION

Petitioner, Khristiane Nicholas Lagua Caraang a.k.a. Khristianeni Lagua Caraang a.k.a. Khristian Caraang, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(2) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(2)), effective September 18, 2008, based upon his conviction of a criminal offense related to neglect or abuse of a patient in connection with the delivery of a healthcare item or service. There is a proper basis for exclusion. Petitioner's exclusion for the minium 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)).

[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 for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated August 29, 2008, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years, pursuant to section 1128(a)(2) of the Act. The basis cited for Petitioner's exclusion was his conviction in the Family Court of the First Circuit, State of Hawaii, of a criminal offense related to neglect or abuse of a patient in connection with the delivery of a health care item or service. Act § 1128(a)(2); 42 U.S.C. § 1320a-7(a)(2); and 42 C.F.R. § 1001.101(b).

Petitioner timely requested a hearing by letter dated September 6, 2008. The case was assigned to me for hearing and decision on September 17, 2008. On October 15, 2008, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated October 16, 2008. Petitioner waived oral hearing and the parties agreed that this case may be resolved on the pleadings and documentary evidence. The I.G. filed a motion for summary affirmance and supporting brief on November 13, 2008 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 through 6. Petitioner filed his brief in opposition to the motion for summary affirmance on December 8, 2008 (P. Brief), with exhibit (P. Ex.) 1. The I.G. notified me by letter dated December 19, 2008, that no reply brief will be filed. No objection has been made to the admissibility of any of the proposed exhibits, and I.G. Exs. 1 through 6, and P. Ex. 1 are admitted.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. On January 16, 2007, Petitioner pled guilty in the Family Court of the First Circuit State of Hawaii, to one count of violation of Hawaii Revised Statute 709-905, Endangering the Welfare of an Incompetent Person. I.G. Ex. 3

2. On January 16, 2007, Petitioner's motion for a deferred acceptance of guilty/no contest plea was accepted by the Family Court and further proceedings were deferred for a period of one year, subject to Petitioner's compliance with the terms and conditions of deferral and payment of a contribution of $500 to the general fund. I.G. Ex. 3.

3. On November 26, 2007, Petitioner's motion for early discharge from deferral supervision and for dismissal of the charge against him was granted by the Family Court. P. Ex. 1.

4. Petitioner does not dispute that on about March 15, 2006, he neglected a patient in his care who was unable to care for himself, by leaving him unattended sitting in a car parked in the garage at his residence. I.G. Ex. 6.

B. Conclusions of Law

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

2. Petitioner was convicted within the meaning of section 1128(i) (42 U.S.C. § 1320a-7(i)) of the Act.

3. Petitioner's conviction is related to the neglect of a patient in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

4. Petitioner's exclusion is mandated by section 1128(a)(2) of the Act.

5. A five-year exclusion is mandatory pursuant to section 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)) of the Act.

6. Exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b).

C. Issues

The Secretary of the Department of Health and Human Services (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).

In this case, there is no issue as to the reasonableness of the proposed period of exclusion as it is the minimum period of five years mandated by the Act.

D. Applicable Law

Petitioner's right to a hearing by an ALJ and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

Pursuant to section 1128(a)(2) 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 neglect or abuse of a patient in connection with the delivery of a health care item or service.

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and 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) and (c).

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 may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

E. Analysis

1. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(2) of the Act.

The I.G. cites section 1128(a)(2) 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)):
>
> > (2) Conviction relating to patient abuse. – Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

The statute requires the Secretary to exclude from participation any individual or entity: (1) convicted of a criminal offense under federal or state law; (2) where the offense is related to neglect or abuse of a patient; and (e) the offense occurred in connection with the delivery of a health care item or service.

Petitioner does not dispute that he pled guilty to neglecting a patient in his care or that the neglect was in connection with the delivery of a health care item or service. Rather, Petitioner argues that he was not convicted of a criminal offense within the meaning of section 1128(i) of the Act. Petitioner advances two arguments: (1) that there is no longer a deferred adjudication and the case against him in the Family Court is a nullity as it has been dismissed (P. Ex. 1); and (2) the reference to deferred adjudication in section 1128(i) of the Act should be read as applying to cases involving fraud only and, under such interpretation, Petitioner's deferred adjudication on his guilty plea would not amount to a conviction. P. Brief at 2-3. Neither argument has merit.

Congress provided a definition of conviction for use in exclusion cases pursuant to section 1128(a) and (b) of the Act. A person is convicted for purposes of sections 1128(a) and (b): (1) when a judgment of conviction is entered by a state, federal, or local court, even though an appeal may still be pending or the record of the conviction has been expunged; (2) when there has been a finding of guilt by a court; (3) when a plea of guilty or no contest is accepted by a court; or (4) when a judgment of conviction is withheld under a first offender, deferred adjudication, or other arrangement. Act § 1128(i); *Henry L. Gupton*, DAB No. 2058 (2007), *ruling on reconsideration*, Ruling No. 2007-1 (2007).

In this case Petitioner entered a guilty plea on January 16, 2007 (I.G. Ex. 3) that, Petitioner does not deny, was accepted by the court (I.G. Ex. 5, at 1-2) and the court granted Petitioner's motion for deferred adjudication of guilt. The court's acceptance of the plea satisfies the definition of conviction under section 1128(i)(3) and the court's granting of deferred adjudication satisfies the definition of conviction under section 1128(i)(4). The case against Petitioner was dismissed on November 26, 2007 when the court granted his motion for early release. P. Ex. 1. Petitioner cites no law of the State of

Hawaii for the proposition that the proceedings against Petitioner on January 16, 2007 were nullified by the dismissal on November 26, 2007, and the order of dismissal does not purport to nullify those proceedings.[2] Further, federal law, specifically section 1128(i) of the Act, not state law provides the definition for conviction in this case. *Travers v. Shalala*, 20 F.3d 993, 996 (9th Cir. 1994). Pursuant to section 1128 (i)(3) and (4), Petitioner was convicted when his guilty plea was entered and he was granted deferred adjudication, for purposes of section 1128(a) and (b) of the Act. The dismissal by the Family Court did not negate the fact that a conviction occurred within the meaning of section 1128(i)(3) and (4) of the Act.

Petitioner argues that deferred adjudication should only be treated as a conviction in cases involving fraud or theft. He cites the discussion of the legislative history of section 1128(i) in *Travers v. Sullivan*, 791 F.Supp. 1471 (E.D. Wash. 1992)[3] in support of his argument that public policy disfavors exclusion and that Congress intended only to apply the deferred adjudication provision to cases involving fraud or theft from Medicare or Medicaid. P. Brief at 2-3. Petitioner relies upon language from the House Report that shows the House Committee recognized the increasing practice of deferred adjudication and expressed concern that individuals who pled guilty or no contest to criminal charges of defrauding Medicare or Medicaid might avoid exclusion by participating in a first offender or deferred adjudication program. The district court in *Travers* read the legislative history to show Congress intended to exclude those who entered into a first-offender or deferred adjudication program and that Congress had a strong desire to exclude those who abused the Medicare or Medicaid system. P. Brief at 3 (citing *Travers*, 791 F.Supp. at 1479-80). My reading of the legislative history is consistent with that of the district court in *Travers*. Congress intended to ensure those convicted of offenses described in section 1128(a) and (b) of the Act did not avoid exclusion simply because a court decided to place them in a first offender or deferred adjudication program. The House Committee may have specifically discussed fraud and abuse of the Medicare and Medicaid programs but the language selected for section 1128(i) did not limit its application to such cases and the language selected is broad enough to include all offenses described in sections 1128(a) and (b), not just those related to financial crimes and fraud.

---

[2] Petitioner's citation of *C.B v. People*, 122 P. Ed. 1065 (Colo.Ct.App. 2005) is inapposite as the court explained that it was proceeding under the law applicable to juveniles rather than the criminal code of Colorado.

[3] Two orders were issued by the district court in *Travers* reported at 791 F.Supp. 1471 and 801 F.Supp. 394 (E.D. Wash. 1992). The district court was affirmed in *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994).

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

Petitioner has not disputed that the minimum period of an exclusion pursuant to section 1128(a)(2) is five years as mandated by section 1128(c)(3)(B), if I determine Petitioner is subject to mandatory exclusion. I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a)(2) and the minimum period of exclusion is thus five years.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid and all federal health care programs for a period of five years, effective September 18, 2008, 20 days after the August 29, 2008, I.G. notice of exclusion.

/s/
Keith W. Sickendick
Administrative Law Judge