Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Cerise Lewis
(OI File No. H-13-42216-9),

Petitioner,

v.

The Inspector General,
Department of Health & Human Services.

Docket No. C-14-1072

Decision No. CR3401

Date: October 6, 2014

DECISION

Petitioner, Cerise Lewis, 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 March 20, 2014. Petitioner's exclusion for a minimum period of five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).[1]

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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 notified Petitioner by letter dated February 28, 2014, 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. cited section 1128(a)(1) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based upon her conviction in the State of Minnesota, District Court, 4th Judicial District, Hennepin County, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Exhibit (Ex.) 1.

Petitioner timely requested a hearing on May 5, 2014. On May 14, 2014, the case was assigned to me to hear and decide. A telephone prehearing conference was convened on June 5, 2014, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued on June 6, 2014.

On July 7, 2014, the I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) with seven exhibits marked as I.G. Exs. 1 through 7. Petitioner filed her opposition to the I.G.'s motion for summary judgment (P. Br.) on July 28, 2014, with one exhibit marked as Petitioner's exhibit (P. Ex.) 1. The I.G. filed a reply brief on August 21, 2014 (I.G. Reply). There have been no objections to my consideration of I.G. Exs. 1 through 7 and P. Ex. 1, and they are admitted as evidence.

II. Discussion

A. Applicable Law

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 of Health and Human Services (the Secretary).

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in any federal health care program any individual 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. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). 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 standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that provides the basis of the exclusion. 42 C.F.R. § 1001.2007(c), (d). 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 the I.G. has a basis for excluding an individual or entity from participating in Medicare, Medicaid, and all other federal health care programs; and
>
> Whether the length of the proposed exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). If the I.G. imposes the minimum period of exclusion authorized for a mandatory exclusion under section 1128(a)(1) of the Act, then there is no issue of whether the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2). Here, the I.G. has proposed to exclude Petitioner for the minimum authorized exclusion period, so the length of the proposed exclusion is not at issue. *Id.*; I.G. Ex. 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 timely filed her request for hearing, and I have jurisdiction.**

2. **Summary judgment is appropriate.**

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

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-.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. Petitioner does not deny that the trial court found her guilty, on stipulated facts, of theft from the Minnesota Medicaid program and stayed the imposition of her sentence for one year while she completed probation. P. Br. at 1; I.G. Ex. 7. Petitioner instead argues that the trial court recently "vacated and dismissed" the original finding of guilt, meaning she no longer has a criminal conviction on her record. P. Br. at 2. Indeed, the I.G. does not dispute that the trial court recently took that action. However, the issue that Petitioner raises, *i.e.*, whether the trial court's action mean she was "convicted" for purposes of section 1128(a) of the Act, must be resolved against her as a matter of law. Accordingly, summary judgment is appropriate.

3. Section 1128(a)(1) of the Act requires Petitioner's exclusion from participation in Medicare, Medicaid, and all other federal health care programs.

a. Facts

The facts of this case are undisputed. On August 12, 2011, a criminal complaint was filed against Petitioner, doing business with her husband as Faith Health Care Services, a private duty nursing agency and personal care provider organization registered with the Minnesota Medicaid program, charging Petitioner with five counts of theft of more than $35,000 by false representation and one count of theft of more than $5,000 by false representation. I.G. Ex. 4 at 1-4. Petitioner waived her right to a jury trial and agreed to a "stipulated facts trial" under the rules of Minnesota criminal procedure. I.G. Ex. 3 at 1. On June 18, 2013, the trial court issued its Findings of Fact, Conclusions of Law, Memorandum, and Order, in which it found Petitioner guilty of Count 5 of the criminal complaint, "theft by false representation, more than $35,000, in violation of Minn. Stat. 609.52, subds. 2(3)(iii) and 3(4)." I.G. Ex. 3 at 4. The trial court specifically found that

Petitioner overbilled the Minnesota Medicaid program a total of $100,412.96 by submitting claims for nursing services not actually rendered. I.G. Ex. 3 at 3-4. The trial court dismissed Counts 1 through 4 and Count 6 of the criminal complaint against Petitioner, "[p]ursuant to agreement of the parties." I.G. Ex. 3 at 4. On October 24, 2013, the trial court issued amended Findings of Fact, Conclusions of Law, Memorandum, and Order but the amendment did not affect the findings and conclusions issued on June 18, 2013 related to the conviction on Count 5. I.G. Ex. 3.

On June 12, 2013, the court sentenced Petitioner to pay a fine of $100 and serve 15 days in the Hennepin County Adult Corrections Facility, referred to in sentencing documents as "the workhouse." I.G. Exs. 5, 7. The court stayed the imposition of the $100 fine for one year, and ordered Petitioner to perform 10 days of "Sentence to Service" within one year in lieu of serving the 15-day "workhouse" sentence. I.G. Exs. 5, 7. The court placed Petitioner on probation for one year while it stayed her sentence and determined that the successful completion of the terms of her probation would result in "vacation of the plea and dismissal of the charge." I.G. Exs. 5, 7. On July 25, 2014, the court found that Petitioner had met all of the conditions of her probation and entered an "Order for Case Amendment," in which it vacated and dismissed Petitioner's conviction as of July 24, 2014. P. Ex. 1.

b. Analysis

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.

Act § 1128(a)(1). Thus, the plain language of section 1128(a)(1) of the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs, any individual or entity: (1) convicted of a criminal offense; (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 any state health care program. The definition of a "[s]tate health care program" includes state Medicaid plans. Act § 1128(h) (42 U.S.C. § 1320a-7(h)).

For an exclusion pursuant to section 1128(a) and (b), an individual or entity is considered to have been "convicted" of an offense if, among other things, "there has been a finding of guilt against the individual or entity by a Federal, State, or local court," or "the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." Act § 1128(i)(2), (4) (42 U.S.C. § 1320a-7(i)(2), (4)). Here, the trial court found Petitioner guilty of theft by overbilling the Minnesota Medicaid system. I.G. Ex. 2 at 4. The court deferred its more severe sentence of Petitioner in lieu of a one-year term of probation, which, upon her successful completion of that probation, resulted in the trial court vacating the guilty finding. I.G. Ex. 7. Nevertheless, the court's initial guilty finding and deferred sentence establish that Petitioner was "convicted" of that offense for purposes of her exclusion under section 1128(a) of the Act. Act § 1128(i)(2), (4).

Petitioner argues that the trial court's vacating her conviction following her successful completion of her probation means she is no longer "convicted" and not subject to exclusion. P. Br. at 2. The trial court's use of the term "vacate" calls into question whether Petitioner's conviction was, as a matter of law, overturned and no longer valid, or whether it was a procedural step by the trial court as part of Petitioner's deferred sentence program. The facts here clearly demonstrate the latter. There is no evidence that Petitioner ever appealed the trial court's guilty finding or filed any post-conviction petitions that argued the court's guilty finding was legally wrong. The regulations consider a conviction to be no longer valid for purposes of an exclusion only if it is "reversed or vacated *on appeal*." 42 C.F.R. § 1001.3005(a)(1) (emphasis added). It is apparent on the record before me that the trial court vacated Petitioner's conviction solely because she performed her probation as ordered, but not because the court found its original guilty finding was in error. I.G. Exs. 5, 7; P. Ex. 1. The trial court's subsequent action in Petitioner's criminal case is akin to a guilty finding and a first offender or deferred adjudication program that the Act expressly considers to be a conviction rather than vacating a conviction on legal grounds through an appeals process.

Petitioner does not dispute that her conviction for theft for overbilling the Minnesota Medicaid program was related to the delivery of a health care item or service under the Medicare or Medicaid program. There can be no doubt that it was. *Burton Siegel, D.O.*, DAB No. 1467 (1994) (concluding that petitioner's facilitation of theft conviction involving misappropriation of Medicaid funds was related to the delivery of a health care item or service under a state health care program). Accordingly, I conclude that all three elements of section 1128(a)(1) of the Act have been met and there is a basis for Petitioner's exclusion.

4. Section 1128(c)(3)(B) of the Act requires a minimum exclusion period of five years for any exclusion action pursuant to section 1128(a) of the Act.

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

Congress established five years as the minimum period of exclusion for exclusions required pursuant to section 1128(a). Act § 1128(c)(3)(B). Pursuant to 42 C.F.R. § 1001.2007(a)(2), when the I.G imposes an exclusion pursuant to section 1128(a) of the Act for the statutory minimum period of five years, there is no issue of whether or not the period is unreasonable. Accordingly, I conclude that Petitioner's exclusion for a period of five years is not unreasonable as a matter of law.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for the minimum statutory period of five years, effective March 20, 2014.

/s/
Keith W. Sickendick
Administrative Law Judge