Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gil S. Caminong
(OI File No. H-13-41888-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-918

Decision No. CR3410

Date: October 08, 2014

DECISION

Petitioner, Gil S. Caminong, appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude him from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(3) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(3)) for a period of five years. For the reasons explained below, I find that there is a legitimate basis for the I.G. to exclude Petitioner, and an exclusion for the minimum period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background and Procedural History

On March 31, 2014, the I.G. notified Petitioner that he was being excluded, effective 20 days from the date of the I.G.'s letter, from participating in Medicare, Medicaid and other federal health care programs pursuant to section 1128(a)(3) for a period of five years. As a basis for the exclusion, the I.G. cited Petitioner's felony conviction in the Superior Court of Arizona, Maricopa County, of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service.

On April 8, 2014, Petitioner filed a timely request for a hearing, and the case was assigned to me. I ordered the parties to file briefs and their proposed exhibits including the written direct testimony of any proposed witnesses. Prehearing Order dated April 23, 2014. The I.G. filed a brief together with 15 exhibits identified as I.G. Ex. 1 - I.G. Ex. 15. Petitioner filed a brief and one exhibit identified as P. Ex. 1. Absent objections, I admit all of the exhibits into the record. Both parties indicated that an in-person hearing was not necessary and agreed that that I may decide this matter based upon the parties' written submissions. P. Br. at 4; I.G. Br. at 7.

II. Issue

The sole issue in this case is whether there is a legitimate basis under section 1128(a)(3) of the Act for the I.G. to exclude Petitioner from participation in Medicare, Medicaid, and other federal health care programs.

III. Discussion

A. Findings of Fact and Conclusions of Law

The essential facts of this case are undisputed. Petitioner was a Medicaid provider of adult foster care and the owner and operator of G and B Adult Foster Care Home (G and B Home) in Phoenix, Arizona. I.G. Exs. 1 and 2. G and B Home is a Medicaid provider licensed by the Arizona Department of Health Services and regulated as a health care institution. I.G. Ex. 2.

M.L.M. was a resident of G and B Home. I.G. Ex. 4. As a resident, she received care as required by the resident's needs described in her admission forms and in her service plan. Under a residency agreement, G and B Home's monthly fee provided, amongst other things, a private room and furnishings, bed and bath linens, personal care needs, all meals and snacks, housekeeping, and activities. Under her Resident Service Plan, G and B Home provided M.L.M. with total assistance with grooming, bathing, dressing, incontinence care, toileting, mobility, and medication administration. I.G. Exs. 4, 5. On March 30, 2011, M.L.M. passed away at G and B Home with a hospice chaplain, a hospice nurse, M.L.M's power of attorney delegate, Petitioner, and Petitioner's wife all in the room at the time. I.G. Ex. 6 at 13. Moments after her death, Petitioner witnessed M.L.M.'s power of attorney sign a document with M.L.M.'s hand. I.G. Exs. 6, 7, 9. Petitioner then wrote his name as a witness to a donation instrument conveying M.L.M's property to the Catholic Community Foundation. I.G. Exs. 6, 7, 9.

Petitioner and the power of attorney were indicted by a Grand Jury on May 17, 2011 and Petitioner was charged with forgery (Count 1). That count provided that Petitioner, with intent to defraud, falsely made, completed or altered a written instrument or one which

contains false information and that conduct occurred when the defendants signed a document with M.L.M.'s hand after she was deceased that stated that M.L.M. wished to donate her personal property, home and money to the Catholic Community Foundation. I.G. Ex. 9 at 2. On August 19, 2011, Petitioner entered into a plea agreement to an amended count 1 that identified the charge as possession of a forgery device.[1] I.G. Ex. 8.

On November 29, 2011, the Superior Court of the State of Arizona, County of Maricopa, issued a judgment that Petitioner was guilty of possession of a forgery device, a class 6 undesignated felony, in violation of Arizona Revised Statutes (A.R.S.) sections 13-2003, 13-2001, 13-301-304, 13-701, 13-702, and 13-801. I.G. Ex. 10. The Superior Court sentenced Petitioner to nine months of probation and ordered him to pay restitution in the amount of $1,000 to the Medicaid Fraud Control Unit. I.G. Ex. 10.

Arizona state law provides as follows:

> 13-603. Authorized disposition of offenders
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> * * *
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> B. If a person is convicted of an offense, the court, if authorized by chapter 9 of this title, may suspend the imposition or execution of sentence and grant such person a period of probation except as otherwise provided by law. The sentence is tentative to the extent that it may be altered or revoked in accordance with chapter 9 of this title, but for all other purposes it is a final judgment of conviction.
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> 13-604. Class 6 felony; designation
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> A. Notwithstanding any other provision of this title, if a person is convicted of any class 6 felony not involving a dangerous offense and if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that it would be unduly harsh to sentence the defendant for a felony, the court may enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly or may place the defendant on probation in accordance with chapter 9 of this title and

[1] Arizona Revised Statutes § 13-2003 provides that a person commits criminal possession of a forgery device if the person "makes or possesses with knowledge of its character and with intent to commit fraud any plate, die, or other device, apparatus, equipment, software, access device, article, material, good, property or supply specifically designed or adapted for use in forging written instruments" and that such a violation is a class 6 felony.

> refrain from designating the offense as a felony or misdemeanor until the probation is terminated. The offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor. This subsection does not apply to any person who stands convicted of a class 6 felony and who has previously been convicted of two or more felonies.
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> B. If a crime or public offense is punishable in the discretion of the court by a sentence as a class 6 felony or a class 1 misdemeanor, the offense shall be deemed a misdemeanor if the prosecuting attorney files any of the following:
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> 1. An information in superior court designating the offense as a misdemeanor.
> 2. A complaint in justice court or municipal court designating the offense as a misdemeanor within the jurisdiction of the respective court.
> 3. A complaint, with the consent of the defendant, before or during the preliminary hearing amending the complaint to charge a misdemeanor.

A.R.S. §§ 13-603(B), 13-604.

On February 17, 2012, consistent with Arizona Rule of Criminal Procedure 27.4(a), Petitioner's probation officer petitioned the Superior Court for early termination of Petitioner's probation because Petitioner had complied with all the conditions of probation and paid all restitution.[2] I.G. Ex. 14. On March 22, 2012, the Superior Court ordered Petitioner discharged from probation and further ordered pursuant to A.R.S. § 13-604 that the Class 6 undesignated felony offense be designated as a misdemeanor. I.G. Ex. 15.

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[2] Ariz. R. Crim. P. 27.4(a) provides as follows:

> Early Termination of Probation
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> a. Discretionary Probation Termination. At any time during the term of probation, upon motion of the probation officer or on its own initiative, the court, after notifying the prosecutor, may terminate probation and discharge the probationer absolutely as provided by law.

1. The I.G. had a legitimate basis for excluding Petitioner under section 1128(a)(3) of the Act.

The four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, *or* the felony offense must have been with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the felonious conduct must have occurred after August 21, 1996. *See also* 42 C.F.R. § 1001.101(c).

The facts establish Petitioner to have been convicted of a felony as described in section 1128(a)(3) of the Act. Section 1128(i) of the Act provides that an individual is considered to have been "convicted" of a criminal offense –

> (1) when a judgment of conviction has been entered against the individual . . . by a Federal, State or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
> (2) when there has been a finding of guilt against the individual . . . by a Federal, State, or local court;
> (3) when a plea of guilty or nolo contender by the individual . . . has been accepted by a Federal, State, or local court; or
> (4) When the individual . . . 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); *see also* 42 C.F.R. § 1001.2.

There is no question that the November 29, 2011 order of the Superior Court stated that the Petitioner knowingly, intelligently and voluntarily entered a plea of guilty and that –

> IT IS THE JUDGMENT of the Court [that Petitioner] is guilty of the following:
> OFFENSE: Count 1 (amended): Possession of a Forgery Device
> Class 6 Undesignated felony
> A.R.S. § 13-2003, 13-2001, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702 and 13-801
> Date of Offense: 3/30/2011
> Non Dangerous – Non Repetitive

I.G. Ex. 10. Consistent with the provisions of A.R.S. §13-604, the court further ordered that it would suspend imposition of the sentence and place Petitioner on unsupervised probation for a period of time. I.G. Ex. 10.

Therefore, I conclude that Petitioner can be considered convicted under section 1128(i) of the Act. Petitioner agreed to plead guilty to a Class 6 undesignated felony under Count 1, the court accepted his plea of guilt, and the Superior Court entered a judgment of conviction against Petitioner for Possession of a Forgery Device, a class 6 undesignated felony. *See* Act § 1128(i)(1),(2), and (3); 42 C.F.R. § 1001.2.

Petitioner however contends that the later re-designation of his offense as a misdemeanor after he successfully completed the terms of his probation means he was not convicted of a "felony," a necessary element of a mandatory exclusion pursuant to section 1128(a)(3). Even though Petitioner's sentence was suspended pending Petitioner's satisfactory completion of the terms of his probation, his offense is still considered a felony conviction under the Act because the offense cannot be re-designated as a misdemeanor offense unless and until there has been successful completion of the probation. In fact, A.R.S. §13-604 specifically provides that "[t]he offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor." This is the kind of first offender, deferred adjudication or other type of post-conviction program envisioned by 1128(i)(4) of the Act. The re-designation of Petitioner's offense under A.R.S. § 13-604 from a felony to a misdemeanor was not based on a decided appeal of his conviction on grounds of legal, factual, or procedural error that would invalidate the conviction and would require reversal of his conviction. Petitioner pled guilty to a felony offense and the Superior Court accepted that plea and entered a judgment of conviction for a felony offense. Thus, for purposes of the Act, the re-designation to a misdemeanor based on completion of his probation does not alter the fact that Petitioner is considered "convicted" of a felony under sections 1128(i) and 1128(a)(3).

I also conclude that Petitioner's conviction was for a felony offense related to fraud. The offense for which Petitioner was convicted, criminal possession of a forgery device, includes as one of its elements, the intention to commit fraud. A.R.S. § 13-2003 A.1. Thus, the fact that Petitioner was convicted of such an offense is sufficient to satisfy the second essential element under section 1128(a)(3).

Petitioner also argues that his offense did not occur in connection with a health care item or services because it occurred after M.L.M. died. However, for an offense to be "in connection with the delivery of a healthcare item or service," there need only be a "common sense connection or nexus" between the offense and the delivery of the health care item or service, which I do find here. *See*

Kevin J. Bowers, DAB No. 2143 (2008), *aff'd, Bowers v. Inspector Gen. of the Dep't of Health & Human Servs.*, No. 1:08-CV-159, 2008 WL 5378338 (S.D. Ohio Dec. 19, 2008). The "in connection with" language has been interpreted broadly. Here, at all times relevant, M.L.M resided at G and B Home, owned and operated by Petitioner, and where Petitioner provided services as a personal care attendant. I.G. Exs. 1, 4. Petitioner is a licensed Medicaid provider who manages G and B home as the licensee and sponsor of the facility. I.G. Exs. 1, 4. G and B Home is licensed and regulated by the Arizona Department of Health Services as a health care institution. As a resident of G and B Home, M.L.M. received services and almost total assistance with most of her activities of daily living such as grooming, bathing, dressing, incontinence care, medication administration and mobility from Petitioner under a written service plan. The fact that the commission of the criminal offense occurred after M.L.M died is of no consequence. There is an obvious "common sense connection" between commission of Petitioner's criminal offense and the delivery of health care services at G and B Home. If M.L.M. was not a resident at G and B Home, Petitioner would not have had the opportunity to commit the criminal activity for which he was convicted. At the time of her death and at the occurrence of the offense, Petitioner was nevertheless responsible for, and entrusted with, the care and safety of M.L.M.

Petitioner also argues that his conviction was not program related, meaning it was not related to the Medicare or Medicaid or any other federal health care program. However, only mandatory exclusions pursuant to section 1128(a)(1) require the conviction to be for criminal offense related to the delivery of an item or service under Medicare or Medicaid. Section 1128(a)(3) has no such requirement.

And, finally, Petitioner's conviction occurred after August 21, 1996, satisfying the fourth essential element.

2. An exclusion of at least five years is mandatory.

The I.G. is required by law to exclude any individual who is convicted of a felony that is described in section 1128(a)(3) of the Act. By law, the minimum length of a mandatory exclusion is at least five years. Act § 1128(c)(3)(b); 42 C.F.R. § 1001.102(a). The I.G. excluded Petitioner for five years, the minimum mandatory exclusion period. Therefore, the length of the exclusion is reasonable as a matter of law.

/s/
Joseph Grow
Administrative Law Judge