Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division

Jeanine Santiago, M.D.
(O.I. File No. 2-13-40376-9),

Petitioner,

v.

The Inspector General,
Department of Health & Human Services.

Docket No. C-17-400

Decision No. CR4966

Date: November 8, 2017

DECISION

The Inspector General (I.G.) of the U.S. Department of Health and Human Services excluded Petitioner, Jeanine Santiago, M.D., from participation in Medicare, Medicaid, and all other federal health care programs for five years pursuant to section 1128(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(1)). Petitioner now challenges the exclusion. For the reasons discussed below, I affirm the I.G.'s exclusion of Dr. Santiago from program participation for five years.

I. Background

The I.G. notified Petitioner by letter dated December 30, 2016, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(1) of the Act. I.G. Exhibit (Ex.) 1.[1] The I.G. based the exclusion on Petitioner's felony conviction in the Duchess County Court of the State of New York of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. *Id.* Petitioner timely requested a hearing on February 28, 2017.

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[1] Document 5a in the official case file maintained in the DAB E-file system; for clarity and simplicity, I will cite to the exhibits attached to the parties' respective briefs by the exhibit numbers therein, not the document numbers assigned by DAB.

The case was assigned to Administrative Law Judge Scott Anderson for hearing and decision. On March 6, 2017, he issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order). On April 5, 2017, Judge Anderson held a pre-hearing conference by telephone. He subsequently issued an Order summarizing the pre-hearing conference. On June 5, 2017, this case was transferred to me.

The I.G. through counsel filed his brief (I.G. Br.) on May 15, 2017, accompanied by I.G. Exs. 1 through 5. Petitioner, proceeding *pro se*, filed her brief (P. Br.) on August 25, 2017, along with a supporting document. The I.G. filed his reply brief (I.G. Reply) on September 11, 2017.

II. Decision on the Record

In the absence of objections from either party, I admit I.G. Exs. 1 through 5 along with Petitioner's supporting document filed with her response brief.

Because neither party has offered witness testimony, an in-person hearing is unnecessary and I issue this decision on the basis of the record provided.

III. Issues

The issues in this case are limited to determining if the I.G. had a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs and, if so, whether the length of the exclusion imposed by the I.G. is unreasonable. *See* 42 C.F.R. § 1001.2007(a)(1).

IV. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner with rights to an Administrative Law Judge (ALJ) hearing and judicial review of the final action of the Secretary of Health and Human Services (Secretary). The right to hearing before an ALJ is set forth in 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 42 C.F.R. § 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. *See* 42 C.F.R. § 1005.6(b)(5).

The Secretary must exclude from participation in federal health care programs any individual convicted of a criminal offense under federal or state law that is related to the delivery of an item or service under Medicare or a state health care program. *See* 42 U.S.C. § 1320a-7(a)(1). The Secretary has promulgated regulations implementing these provisions of the Act. *See* 42 C.F.R. § 1001.101(a).

Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld. The statute does not distinguish between misdemeanor and felony convictions.

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

V. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold and followed by pertinent findings of fact and analysis.

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

There is no dispute that Petitioner timely requested a hearing. I therefore have jurisdiction to hear and decide this case. *See* 42 C.F.R. §§ 1001.2007(a)(1)-(2), 1005.2(a); *see also* 42 U.S.C. § 1320a-7(f)(1).

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

Exclusion from participation in Medicare, Medicaid, and all federal health care programs is required by section 1128(a)(1) of the Act when: (1) the individual has been convicted of a criminal offense; and (2) the criminal offense is related to the delivery of an item or

service under Medicare or a state health care program. *See* 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.101(a). The I.G. has established these elements by a preponderance of the evidence.

1. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act.

Petitioner, a physician, was indicted before the Dutchess County Court of the State of New York on one count of Grand Larceny in the Second Degree, one count of Grand Larceny in the Fourth Degree, six counts of Offering a False Instrument for Filing in the First Degree, and twelve counts of Unauthorized Practice of a Profession (Medicine). I.G. Ex. 3 at 1. On November 16, 2015, Petitioner was convicted by a jury of one count of Offering a False Instrument for Filing and three counts of Unlawful Practice of Medicine. I.G. Ex. 4; Ex. 5 at 5. The court sentenced Petitioner to a three-year conditional discharge, $4,500 fine, and 200 hours of community service. I.G. Ex. 4.

Petitioner requests that I overlook her convictions because they are currently "being contested and in the process of appeal with the Supreme Court Appellate Term." P. Br. at 5-6. Petitioner further contends that the convictions resulted from a confused jury and issues of fact, and asserts I should consider these factors and overturn her exclusion by the I.G. *Id.* at 1, 5.

Petitioner's arguments are without merit. Regardless of whether an appeal is pending, the entry of the judgment by a court amounts to a conviction within the meaning of section 1128(i)(1) of the Act. *See* 42 U.S.C.§ 1128(i)(1); 42 C.F.R. § 1001.2. As for her substantive attacks upon the underlying process by which she was convicted, the Secretary's regulations explicitly prohibit Petitioner from collaterally attacking her conviction before me. 42 C.F.R. § 1001.2007(d) ("When the exclusion is based on the existence of a criminal conviction . . . the basis of 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.").

I therefore conclude that Petitioner was convicted of a criminal offense as contemplated by 42 U.S.C. § 1320a-7(a)(1) .

2. Petitioner's criminal offense is related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1) of the Act.

The Act requires Petitioner be excluded from participation in federal programs if she was convicted of an offense relating to the delivery of an item or service under Medicare or a state health care program. *See* 42 U.S.C. § 1320a-7(a)(1). The statute requires some

"nexus" or "common sense connection" between the offense of which a petitioner was convicted and the delivery of an item or service under a covered program. *See Berton Siegel, D.O.*, DAB No. 1467 (1994).

Here, Petitioner was enrolled as a provider in Medicare and Medicaid, both covered programs. I.G. Ex. 3 at 2-3. As described in the complaint against Petitioner, her convictions stem from her involvement in submitting claims for reimbursement for physician services to Medicare and Medicaid between May 21, 2008 and December 5, 2012, which were exclusively or nearly exclusively provided by Petitioner's registered nurse, not Petitioner. In billing for physician services that were not in fact provided by a physician, Petitioner received in excess of $50,000 and $1,000 from Medicare and Medicaid, respectively, to which she was not entitled. I.G. Ex. 2 at 2.

Petitioner also provided the registered nurse with pre-signed prescriptions so that the registered nurse could prescribe medications. I.G. Ex. 2 at 3. The offenses for which Petitioner was convicted are clearly related to the delivery of an item or service under the Medicare and Medicaid programs. The elements necessary for exclusion pursuant to section 1128(a) of the Act are satisfied. Petitioner's billing of claims as if she performed the services is improper and relates directly to the delivery of a service under a state health care program. *See Craig Richard Wilder*, DAB No. 2416 at 6 (2011) ("In any event, false billing for items or services has been repeatedly held to be an offense related to the delivery of an item or service within the meaning of section 1128(a)(1).").

The two elements that trigger mandatory exclusion under section 1128(a)(1) of the Act are satisfied. Accordingly, I conclude that there is a basis for Petitioner's exclusion, and her exclusion is mandated by section 1128(a)(1) of the Act.

3. Petitioner must be excluded for a minimum of five years; the period of exclusion is therefore reasonable as a matter of law.

Because I have concluded that there is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act, Petitioner must be excluded for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period, and I may not reduce the period of exclusion below five years.

VI. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(1) of the Act, effective January 19, 2017.

_____/s/_____
Bill Thomas
Administrative Law Judge