Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Charice D. Curtis
Docket No. A-12-13
Decision No. 2430
December 21, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner Charice D. Curtis, a registered nurse, appeals the September 16, 2011 decision of Administrative Law Judge (ALJ) Richard J. Smith, sustaining her exclusion from participating in Medicare, Medicaid, and all other federal health care programs under section 1128(a)(3) of the Social Security Act for the mandatory minimum period of five years. *Charice D. Curtis*, DAB CR2430 (2011) (ALJ Decision). The Inspector General (I.G.) of the Department of Health and Human Services excluded Petitioner based on her felony conviction for fraud. On appeal, Petitioner argues that her offense was not committed "in connection with the delivery of a health care item or service" within the meaning of section 1128(a). The ALJ rejected that argument, and, for the reasons explained below, we sustain the ALJ Decision.

Applicable legal authority

As relevant here, section 1128(a)(3) requires the exclusion of any individual convicted under federal or state law " in connection with the delivery of a health care item or service . . . of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." (Emphasis added). The implementing regulation at 42 C.F.R. § 1000.101(c)(1) provides that the I.G. "will exclude any individual" who has been convicted, under federal or state law, of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct "[i]n connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such items or services[.]" The mandatory minimum period of exclusion under section 1128(a)(3) is five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

In hearings on mandatory exclusions under section 1128(a)(3), the issues before the ALJ are whether there is a basis for the exclusion, and whether the length of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(1).

Background

The following facts from the ALJ Decision are not in dispute. Petitioner was the nurse administrator of the Evansville, Indiana office of Omni Home Care (Omni), which provides home health care services in five states, including Indiana. Beginning in April 2008, Petitioner fraudulently opened a credit card account in Omni's name. Over a seven-week period she used that credit card account to buy approximately $304,319 in gift cards. Some of the gift cards were used without Omni's knowledge as bonuses for Omni employees, but Petitioner used some of the gift cards to purchase major household appliances and other merchandise for herself. In late June 2008, Petitioner attempted to obtain additional gift cards worth $265,000, but she and the manager of Omni's Evansville office were arrested after this attempt. ALJ Decision at 1-2.

On January 7, 2009, Petitioner and the Evansville office manager were charged with two felony counts of Fraud in Connection with Access Devices, in violation of 18 U.S.C. § 1029(a)(2), (a)(3), (b)(1), and (c)(1)(A)(i). Petitioner pled guilty to both charges on July 29, 2009 and was sentenced to a 15-month term of imprisonment and ordered to pay $90,947 in restitution to the credit card issuer. On February 28, 2011, the I.G. notified Petitioner that she was being excluded pursuant to the terms of section 1128(a)(3) of the Act for the mandatory minimum period of five years.[1] *Id.* at 2.

Petitioner requested an ALJ hearing, and the ALJ received the parties' briefs and exhibits. The ALJ granted the I.G.'s motion for summary disposition, holding that there were no disputed issues of material fact and that the I.G. had established a basis for Petitioner's exclusion.

The ALJ determined that Petitioner's case presented the "essential elements necessary to support an exclusion" under section 1128(a)(3) of the Act: the excluded individual was convicted of a felony offense; the felony offense was based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; and the felony offense was for conduct in connection with the delivery of a health care item or service.[2] ALJ Decision at 4-5.

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[1] Section 1128(a)(3) applies to offenses that occurred "after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996," August 21, 1996, and so applies here. Act § 1128(a)(3); Pub. L. No. 104-191; 110 Stat.1936.

[2] The ALJ noted that section 1128(a)(3) also applies to a felony offense based on conduct relating to fraud or the other listed offenses "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." ALJ Decision at 4. The I.G. did not exclude Petitioner on that basis.

The ALJ found that Petitioner did not deny that she was convicted of two felony offenses. He also concluded that Petitioner "does not explicitly dispute the relation of the conduct underlying her convictions to fraud or theft" and that "that relationship is conceded by her admissions that she had no authorization from Omni to open and use the credit card account in its name, and that she was able to do so only because of her administrative position at Omni." ALJ Decision at 5, citing P. Ans. Br. at 1. According to the ALJ, the only issue in dispute was whether her offense was "in connection with the delivery of a health care item." ALJ Decision at 5.

The ALJ rejected her argument that her criminal offense was not in connection with the delivery of a healthcare item or service. *Id.* He accepted "that her conduct did not include theft of a patient's identity or submission of false billings for goods or services" but found that Petitioner "fails to appreciate the broad reading that must be given to the phrase 'in connection with the delivery of a health care item or service . . . .'" *Id.* The ALJ cited Board cases as holding that what the phrase requires is that "a 'common sense connection or nexus' between the offense and the delivery of a health care item or service be established after an analysis of the specific facts involved." *Id.* citing *Kevin J. Bowers*, DAB No. 2143 (2008), *aff'd Bowers v. Inspector General of the Dep't of Health & Human Servs.*, No. 1:08-CV-159, 2008 WL 5378338 (S.D. Ohio Dec. 19, 2008); *Andrew D. Goddard*, DAB No. 2032 (2006); *Kenneth M. Behr*, DAB No. 1997 (2005); *Erik D. DeSimone, R. Ph.*, DAB No. 1932 (2004).

The ALJ concluded that there was "an obvious 'common sense connection' between Petitioner's activity and Omni's function in delivering home health care items and services" because the "means by which she carried out her criminal activity were Omni's creditworthiness and the credit card account she obtained by relying on it." ALJ Decision at 6. He also noted that the regulation implementing section 1128(a)(3) includes within the statute's reach "the performance of management or administrative services in the delivery" of health care items or services. *Id.* citing 42 C.F.R. § 1001.101(c)(1). The ALJ observed that Petitioner could not have engaged in her criminal fraud "without holding a position of responsibility at Omni," that she "formed and executed her plan" with the agreement of "other Omni administrators acting in their managerial roles," and that "the opportunity for bringing the entire criminal plan to fruition was her position of responsibility as Omni's nurse administrator in the local office." *Id.* The ALJ cited ALJ decisions sustaining exclusions under section 1128(a)(3) for criminal fraud in connection with the delivery of a health care item or service where the petitioner held "a position of responsibility with a health care provider" and "abused that position to the provider's financial detriment, even in the absence of a showing that the ultimate beneficiaries of the peculations may have been employees or programs of the provider itself." ALJ Decision at 6, citing *Susan Malady*, DAB CR835 (2001), *aff'd*, DAB No. 1816 (2002); and *Donald R. Hicks, M.D.*, DAB CR765 (2001).

Finally, the ALJ stated that he had "searched all of Petitioner's pleadings for any arguments or contentions that might raise a valid, relevant defense to the I.G.'s Motion, but [had] found nothing that could be so construed." ALJ Decision at 6. He concluded that summary judgment in favor of the I.G. was appropriate because "the material facts in this case are undisputed and unambiguous" and the required elements for an exclusion were present. *Id.* at 7.

Standard of review

The standard of review on a disputed issue of law is whether the ALJ Decision is erroneous. 42 C.F.R. § 1005.21(h). The standard of review on a disputed issue of fact is whether the ALJ Decision is supported by substantial evidence on the whole record. *Id.*

Analysis

Petitioner argues as she did before the ALJ that her criminal offense was not in connection with the delivery of a healthcare item or service. In support she states that she was not convicted under federal law criminalizing "health care fraud," at 18 U.S.C. § 1347; that none of the fraudulently purchased gift cards "involved the use of health care items, health care services, government reimbursement for care provided, stealing of patient identify, or any item or service related to healthcare;" and that the credit card account she fraudulently opened on Omni's behalf "could have just as easily been opened and the gift cards purchased" had she been the administrator of a non-health care entity or corporation. P. Appeal at 1. She also cites a letter from her former employer expressing confidence in her qualifications to be a part of his leadership team.[3]

None of these arguments demonstrates any error in the ALJ Decision. That Petitioner was not convicted of health care fraud under 18 U.S.C. § 1347 does not preclude her exclusion under section 1128(a)(3) of the Act. Section 1128(a)(3) does not require that the felony conviction be for an offense specified as "health care fraud" under federal or state law. First, the plain language of section1128(a)(3) encompasses felonies "relating to" fraud and the other types of listed offenses, not just to felonies that constitute fraud or one of the other listed offenses. Furthermore, by including "other financial misconduct" as well as "fraud, theft, embezzlement, [and] breach of fiduciary responsibility," Congress clearly intended to broadly encompass financially-related offenses. In any

[3] That letter, which Petitioner designated as Exhibit 4 and we refer to as Appeal Exhibit 4, is one of three new exhibits Petitioner submitted on appeal. The others, Appeal Exhibits 2 and 3, consist of information about the federal offense of health care fraud, 18 U.S.C. § 1347. Appeal Exhibit 1 is Petitioner's appeal arguments. The regulations state that if any party "demonstrates to the satisfaction of the DAB that additional evidence not presented" at the ALJ hearing "is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence." 42 C.F.R. § 1005.21(f) (emphasis added). Petitioner has not made the required showing for consideration of the additional evidence here.

event, Petitioner herself does not deny that she was convicted of fraud. She only denies that the fraud was health care fraud or was committed in connection with the delivery of a health care item or service.

Moreover, the statute does not limit exclusions under section 1128(a)(3) to offenses involving the actual delivery of healthcare but broadly covers offenses "in connection with the delivery of a health care item or service" (emphasis added). As the ALJ observed, the Board has held that a connection exists where "there is a 'common sense connection' (or 'nexus') between the offense of which a petitioner was convicted and the delivery of a health care item or service." *Kenneth M. Behr* at 8, citing *Erik D. DeSimone, R.Ph.* (both sustaining exclusions for crimes not involving the actual delivery of a health care item or service, i.e., embezzlement and theft of medications from petitioners' employers, respectively).

Here, the nexus or common-sense connection between Petitioner's felony fraud and the delivery of health care items or services is evident from the fact that her employer, Omni, was engaged in furnishing health care items and services (home health care) and from Petitioner's status as a manager for Omni. Omni's revenue stream and its expenses derived from the provision of home health services. Petitioner's actions had an impact on that revenue stream by diverting from it over $300,000 over a seven-week period, and she subsequently attempted to divert an additional $265,000. Those funds would not have been available for diversion by Petitioner but for Omni's having been engaged in the delivery of health care services. Petitioner posits that she could have engaged in the same crimes had she been the administrator of a company not engaged in providing health care, but that is not the case before us. The fact is that she *was* employed by a health care business, and criminally appropriated money that derived from and could have otherwise been used to fund the provision of health care items or services.

Additionally, as the ALJ also pointed out, the regulation implementing section 1128(a)(3) states that offenses committed in connection with the delivery of a health care item or service include "the performance of management or administrative services relating to the delivery of such items or services." 42 C.F.R. § 1001.101(c)(1) (emphasis added); ALJ Decision at 5. Petitioner concedes she "was the Administrator of a Health care Agency." P. App. At 1. The regulatory language and its history support her exclusion. This language first appeared in a prior version of 42 C.F.R. § 1001.101 published in 1992, mandating exclusions for criminal offenses "related to the delivery of an item or service under 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." 57 Fed. Reg. 3330 (Jan. 29, 1992). In proposing that rule, the I.G. stated that mandatory exclusions under section 1001.101(a) "are broadly defined to include offenses relating to performance of management or administrative services

relating to delivery of items or services under the program." 55 Fed. Reg. 12,205, 12,206-07 (Apr. 2, 1990) Among the examples of offenses mandating exclusion the I.G. included "a nursing home administrator convicted of using a Medicaid beneficiary's patient fund account for his or her own use." 55 Fed. Reg. at 12,207. As in the example, Petitioner was able to commit the offense because of her position as the administrator of a health care agency, even if she was not actually engaged in the delivery of health care items or services. She also used the fraudulently opened account to buy gift cards for employees of the healthcare company.

Petitioner argues that her exclusion for five years is unwarranted because, she reports, a former employer who was convicted of four felonies related to Medicare fraud, including taking patients' prescription narcotic medications, told her that she was excluded for only 3.5 years. Whether another person's exclusion period was less than five years is irrelevant. Section 1128(c)(3)(b) requires that exclusions under section 1128(a) be for a minimum period of five years, and the applicable regulations provide that when the I.G. has imposed a mandatory five-year exclusion, the ALJ is restricted to considering only whether there was a basis for imposing the exclusion. 42 C.F.R. § 1001.2007(a)(1)(i), (2); *see, e.g., Tamara Brown*, DAB No. 2195, at 8 (2008) ("the plain language of the statute requires the duration of Petitioner's exclusion to be no less than five years, and the ALJ made no error in concluding that the duration of the penalty was reasonable as a matter of law.").

Petitioner also cites the damage to her career the exclusion has wrought and expresses remorse for her conduct and her desire to continue working as a nurse. The regulations limit the ALJ's review in this case to determining whether the I.G. had a basis for the exclusion, and further limit our review of an exclusion to evaluating whether the ALJ decision was free of legal errors and supported by substantial evidence. 42 C.F.R. §§ 1001.2007(a)(1), 1005.21(h). We thus have no authority to provide the equitable relief Petitioner seeks.

Petitioner also questions the timing of the I.G.'s decision to exclude her by notice dated February 28, 2011, when she was convicted in July 2009 and imprisoned from May to December 2010. She requests that that time be counted towards her exclusion. We are barred by regulation from considering this argument because Petitioner did not raise it before the ALJ. 42 C.F.R § 1005.21 (the Board "will not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been raised before the ALJ but was not."). In any event, we note that the Board "has repeatedly held that the statute and regulations give an ALJ no authority to adjust the beginning date of an exclusion by applying it retroactively" or "to review the timing of a petitioner's exclusion." *Randall Dean Hopp*, DAB No. 2166, at 3-4 (2008) (citations omitted).

Conclusion

For the reasons discussed, we affirm the ALJ Decision.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member