Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Bethany Anne Winther-Galimore and the Winther Family Chiropractic Center, LLC,
(O.I. File Number 7-08-40116-9),

Petitioner,

v.

The Inspector General.

Docket No. C-11-831

Decision No. CR2501

Date: February 13, 2012

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determinations to exclude Petitioners Bethany Anne Winther-Galimore and the Winther Family Chiropractic Center, LLC, from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. With respect to Petitioner Bethany Anne Winther-Galimore, the I.G.'s Motion and determination are based on section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). With respect to Petitioner Winther Family Chiropractic Center, LLC, the I.G.'s Motion and determination are based on section 1128(b)(8) of the Act, 42 U.S.C. § 1320a-7(b)(8).

The undisputed facts of this case demonstrate that the five-year exclusion must be imposed against each Petitioner, and that the length of each period of exclusion is not unreasonable. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

In 2007 and 2008, Bethany Anne Winther-Galimore, a chiropractor, owned and operated the Winther Family Chiropractic Center, LLC (WFCC), located in Camdenton, Missouri.

In February 2008 law enforcement officials began an investigation into Winther-Galimore's activities as they related to the Dove Senior Citizens Home in that community. That investigation revealed that Winther-Galimore had billed the Medicare program for chiropractic services that were not performed by her or received by several residents of the Dove facility.

On July 22, 2009, in the Circuit Court of Camden County, Missouri, Winther-Galimore was charged with the class C felony offense of stealing by deceit, in violation of MO. REV. STAT. § 570.030. On August 23, 2010, Winther-Galimore appeared in the Circuit Court with counsel and tendered a plea of guilty to the charge. Her plea was accepted and Winther-Galimore was adjudged guilty of the offense. Imposition of sentence was suspended and Winther-Galimore was placed on probation for five years. As a condition of probation, Winther-Galimore was required to pay an unspecified sum to what court documents designate a "victim's compensation judgment" and court costs.

On August 31, 2011, the I.G. notified Winther-Galimore that she was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for a period of five years. The I.G. also sent a similar notice of exclusion for five years to WFCC on August 31, 2011, and in that notice relied on the terms of section 1128(b)(8) of the Act.

Acting through counsel, Winther-Galimore and WFCC sought review of the I.G.'s determinations in a joint request for hearing timely filed on September 26, 2011.

I convened a prehearing conference by telephone on October 26, 2011, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures for addressing the issues presented by this case. By order of October 27, 2011 I established a schedule for the submission of documents and briefs.

The evidentiary record on which I decide the issues before me contains 21 exhibits. The I.G. proffered 12 exhibits marked I.G. Exhibits (I.G. Exs.) 1-12. Petitioners have jointly proffered nine exhibits, marked Petitioners' Exhibits (P. Exs.) 1-9. In the absence of objection, I have admitted all proffered exhibits as designated by the offering party.

The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) with the receipt of Petitioners' Notice of Intent Not to File Response Brief on February 2, 2012.

II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the context of this record, they are:

a. Whether the I.G. has a basis for excluding each Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to sections 1128(a)(1) and 1128(b)(8) of the Act; and

b. Whether the length of each proposed period of exclusion is unreasonable.

These issues must be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner Winther-Galimore's exclusion for her predicate conviction has been proven. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). Petitioner WFCC is subject to the same period of exclusion by operation of the terms of section 1128(b)(8) of the Act and 42 C.F.R. § 1001.1001(b)(1). The length of neither proposed period of exclusion is unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of a criminal offense related to the delivery of an item or service under title XVIII of the Act (the Medicare program) or any state health care program (the Medicaid program). The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.101(a). Section 1128(a)(1) does not distinguish between felonies and misdemeanors as predicates for exclusion.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual or entity . . . by a . . . State . . . court, regardless of . . . whether the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; "when there has been a finding of guilt against the individual or entity . . . by a . . . State . . . court," section 1128(i)(2) of the Act; "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a . . . State . . . court," section 1128(i)(3) of the Act; or "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," section 1128(i)(4) of the Act, 42 U.S.C. §§ 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) is mandatory and the I.G. must impose it for a minimum period of five years. Act, § 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

Section 1128(b)(8) of the Act, 42 U.S.C. § 1320a-7(b)(8), authorizes the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any

business entity that is owned, operated, or managed by, or has as its agent, any person "who has been convicted of any offense described in subsection (a) of this section . . . " or who has been excluded from a federal or state health care program. Exclusions under section 1128(b) are permissive, and entities excluded under section 1128(b)(8) generally must be excluded for the same period as the person whose relationship with the entity is the basis for the exclusion. 42 C.F.R. § 1001.1001(b)(1).

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).

IV. Findings and Conclusions

I find and conclude as follows:

1. On July 22, 2009, in the Circuit Court of Camden County, Missouri, Petitioner Bethany Anne Winther-Galimore was charged with the class C felony offense of stealing by deceit, in violation of MO. REV. STAT. § 570.030. I.G. Ex. 7; P. Ex. 7.

2. On August 23, 2010, Petitioner Winther-Galimore appeared in the Circuit Court with counsel and tendered a plea of guilty to the class C felony charge of stealing by deceit, in violation of MO. REV. STAT. § 570.030. Her plea was accepted and Winther-Galimore was adjudged guilty of the offense. I.G. Exs. 8, 9, 10; P. Ex. 8.

3. After accepting Petitioner Winther-Galimore's plea of guilty and finding her guilty as charged, the Circuit Court suspended imposition of sentence and placed her on probation for five years, beginning on August 23, 2010. As a condition of her probation, Petitioner was ordered to pay an unspecified amount in restitution and court costs. I.G. Exs. 9, 10; P. Ex. 8.

4. The judgment of conviction, finding of guilt, and accepted plea of guilty described above in Findings 2 and 3 constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act, and 42 C.F.R. § 1001.2.

5. A nexus and a common-sense connection exist between the criminal offense of which Petitioner Winther-Galimore was convicted, as noted above in Findings 1 and 2, and the delivery of an item or service under the Medicare program. I.G. Exs. 3, 4, 7, 8; P. Exs. 3, 4, 7, 8, 9; *Berton Siegel, D.O.,* DAB No. 1467 (1994).

6. By reason of Petitioner Winther-Galimore's conviction, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-

7(a)(1), to exclude her from participation in Medicare, Medicaid, and all other federal health care programs.

7. Petitioner Winther-Galimore is the owner and agent of Petitioner WFCC. I.G. Exs. 3, 5, 6, 11, 12; P. Exs. 1, 2, 9.

8. Because Petitioner Winther-Galimore is the owner and agent of Petitioner WFCC, and because of her conviction as noted above in Findings 1-6, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(b)(8) of the Act, 42 U.S.C. § 1320a-7(b)(8), to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

9. The I.G.'s exclusion of each Petitioner for a period of five years is not unreasonable. Findings 1-8 above.

10. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The Exclusion of Petitioner Winther-Galimore

The essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under title XVIII of the Act (Medicare) or any state health care program (Medicaid). *Tamara Brown,* DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.,* DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005), *aff'd sub nom. Kai v. Leavitt*, Civ. No. 05-00514 (D. Haw. July 17, 2006); *see also Russell Mark Posner*, DAB No. 2033, at 5-6 (2006). Those two essential elements are fully demonstrated in the evidence before me.

Winther-Galimore's conviction is shown by I.G. Exs. 8, 9, and 10, and by P. Exs. 7 and 8. The Circuit Court's acceptance of her guilty plea, its finding of her guilt, and its entry of judgment of conviction on August 23, 2010 satisfied the definitions of "conviction" set out at sections 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act. The first essential element is established by the record. I will discuss Winther-Galimore's challenge to the proof of this first element below.

The evidence also shows that Winther-Galimore's conviction is related to the delivery of an item or service under the Medicare program. Petitioner submitted fraudulent claims to the Medicare program for chiropractic services she never performed. An extended

history of the investigation into Winther-Galimore's abuse of the Medicare program appears in I.G. Ex. 3 and P. Ex. 3. The detailed language of the charge to which she pleaded guilty makes the connection explicit and both her statement to investigators and her plea petition repeat the connection in her own handwriting. I.G. Exs. 7, 8; P. Exs. 4, 7, 8. The submission of false claims to the protected health care programs has been consistently held to be a program-related crime within the reach of section 1128(a)(1). *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Dewayne Franzen*, DAB No. 1165 (1990); *Jack W. Greene,* DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan,* 731 F. Supp. 835 (E.D. Tenn. 1990). I find the facts of Winther-Galimore's crime demonstrate the required nexus and common-sense connection between the crime and the Medicare program. *Berton Siegel, D.O.,* DAB No. 1467. The second essential element is established by the record.

Winther-Galimore argues that certain provisions of Missouri law operate to keep the definitions of "conviction" established by the Act from applying to her. She relies on MO. REV. STAT. § 610.105, a provision by which records of criminal proceedings can be sealed — or, in the statute's precise wording, "closed" — in certain circumstances, thus barring those proceedings from forming the predicate for collateral actions in which a prior Missouri conviction must be proven. The details of the Missouri statute and its operation are not critical to this discussion.[1] Instead, the established law of this forum requires that the Act's definitions of conviction be applied in these circumstances. *Ellen L. Morand*, DAB No. 2436 (2012); *Henry L. Gupton*, DAB No. 2058 (2007), *aff'd*, *Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008); *Marc Schneider, D.M.D.*, DAB No. 2007 (2005); *Carolyn Westin*, DAB No. 1381 (1993), *aff'd sub nom*, *Westin v. Shalala*, 845 F.Supp. 1446 (D. Kan. 1994); *see Myrna Baptista*, DAB CR2410 (2011); *Theresa A. Bass*, DAB CR1397 (2006). Those definitions — noted in sections 1128(a)(1) and 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act, and arguably in section 1128(i)(4) — encompass the proceedings against Witner-Galimore. By the federal definitions applicable in this federal litigation aimed at protecting the integrity of federal health care programs, the criminal proceedings against Winther-Galimore ended in her conviction.

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[1] It is true, as Winther-Galimore points out, that the disposition of her charges on August 23, 2010 left her eligible at some time in the future for the relief provided by MO. REV. STAT. § 610.105. But even if Missouri criminal law governed this situation, the terms of the statute are clear that the records of Winther-Galimore's plea and adjudication of guilt cannot be "closed until August 2015: "If . . . imposition of sentence is suspended . . . official records pertaining to the case shall thereafter be closed records *when such case is finally terminated* . . . . MO. REV. STAT. § 610.105 (emphasis added). Presumably Winther-Galimore understood that her records had not been closed and that her term of probation would last until 2015 when she stipulated to those facts before the Missouri State Board of Chiropractic Examiners. P. Ex. 9, at 3; I.G. Ex. 4, at 3.

Winther-Galimore goes on to argue that if she must be excluded, that exclusion ought to be based on the permissive authority granted to the I.G. in section 1128(b)(1) of the Act, and should be for only three years, not for the minimum five-year period mandated by section 1128(a)(1). She supports this argument with the claim that the charge to which she pleaded guilty was a misdemeanor, not a felony, and that the shorter three-year term is "appropriate because of mitigating circumstances" which she lists. P. Ans. Br. at 11-13.

This argument abides comfortably neither with the facts of Winther-Galimore's conviction nor with the plain language of the statutes and regulations involved. As to the facts, Winther-Galimore's labored effort to cast her crime as a misdemeanor is belied by the statement in her plea petition, written in her own hand: "I appropriated U.S. currency, by billing for services which I did not perform. The total value . . . I received was approximately $3300. " P. Ex. 8, at 2. It is further belied by her own stipulation, in proceedings before the Missouri State Board of Chiropractic Examiners, that she pleaded guilty "to the Class C Felony charge of Theft/Stealing by Deceit (value of property or services $500 or more but less than $25,000), which constitutes a violation of Section 570.030, RSMo. " P. Ex. 9, at 3; I.G. Ex. 4, at 3.

But this argument and the considerable distortion of the record it incorporates are beside the point for at least two reasons. First, section 1128(a)(1) makes no distinction between misdemeanors and felonies as predicates for exclusion. A conviction based on either class of criminal offense is sufficient predicate for an exclusion based on section 1128(a)(1). *Craig Richard Wilder*, DAB No. 2416 (2011); *Lorna Fay Gardner*, DAB No. 1733 (2000); *Tanya A. Chouke, R.N.*, DAB No. 1721 (2000); *see Tamara Brown*, DAB CR1799 (2008). Second, once a conviction is shown to be within the reach of section 1128(a), the mandatory operation of that section bars a petitioner from demanding that the I.G. apply the terms of any part of section 1128(b), even in situations where the underlying conviction could be argued to fall within section 1128(a) and one or more of the provisions of sections 1128(b)(1)-(15). *Craig Richard Wilder*, DAB No. 2416; *Kenneth M. Behr*, DAB No. 1997 (2005); *Stacy Ann Battle, D.D.S, et al.*, DAB No. 1843 (2002); *Lorna Fay Gardner*, DAB No. 1733.

Although I have characterized the process of exclusion under section 1128(a)(1) as mandatory, section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B) provides that "the Secretary may, after consulting with the Inspector General . . . waive the exclusion under subsection (a)(1) . . . . " Such a waiver depends on a request from the administrator of a federal or state health care program, and by the terms of 42 C.F.R. § 1001.1801(a) must be in writing, must come from an individual directly responsible for administering the program, and must assert that the individual for whom waiver is sought is a "sole source" in the community. Significantly, both statute and regulation emphasize that the

decision to grant or deny a waiver is not reviewable here or elsewhere. Act, § 1128(c)(3)(B); 42 C.F.R. § 1001.1801(f).

Winther-Galimore has attempted to bring herself within the reach of this waiver provision, although she cites the statutory provision incorrectly as 42 U.S.C. § 1320A-7(B) and cites the regulation not at all. But her effort lacks the essential foundation of a request from a program administrator, and it asserts facts insufficient to meet the "sole source" requirement. Thus, even were the decision to grant or deny the waiver subject to my review, I could hardy find an abuse of discretion in the denial of a request never made, and if made, made on insufficient facts. Winther-Galimore is not entitled to a waiver of her exclusion.

A survey of Winther-Galimore's remaining arguments reveals that they present no basis for overturning the I.G.'s action. She offers a series of factual assertions intended to be "mitigating circumstances" as that term is used in section 1128(c)(3)(D) of the Act, but since section 1128(c)(3)(D) applies only to certain permissive exclusions under section 1128(b) and not to this section 1128(a)(1) action, they are inapposite to this case. Nor are they cognizable as mitigating factors in the sense comprehended by 42 C.F.R. § 1001.102(c), for the I.G. has not attempted to enhance the period of exclusion by alleging any of the aggravating factors listed at 42 C.F.R. § 1001.102(b). Winther-Galimore's self-justifying assertions — that her crime was accidental, a mere business mistake made during a time of physical and mental stress and made without the intent to defraud Medicare, and that her guilty plea may have been based on an imperfect understanding of its consequences — are all challenges that amount to collateral attacks on her conviction. They are irrelevant here, for the regulations explicitly preclude any collateral attack on Winther-Galimore's conviction. "When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for 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." 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000). "There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions." *Chander Kachoria, R.Ph.*, DAB No. 1380, at 8 (1993).

Because the I.G. has established a basis for Petitioner Bethany Anne Winther-Galimore's exclusion pursuant to section 1128(a)(1), her exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act. 42 U.S.C. § 1320a-7(c)(3)(B). That period is reasonable as a matter of law.

The Exclusion of Petitioner WFCC

The exclusion of a business entity based on section 1128(b)(8) of the Act, 42 U.S.C. § 1320a-7(b)(8) is a derivative action. It depends first on a showing that a person has been convicted of an offense described in sections 1128(a), 1128(b)(1), 1128(b)(2), or 1128(b)(3) of the Act; or has been assessed a civil monetary penalty under sections 1128A or 1129 of the Act; or has been excluded from participation in a program under Title XVIII of the Act (Medicare) or a state health care program. If that first showing is made, then the business entity is subject to exclusion on the further showing that the person in question bears a relationship of responsibility, defined in detail at section 1128(b)(8)(A), to that business entity.

In this case, the I.G. has made the first showing, as I have discussed above. Petitioner Bethany Anne Winther-Galimore has been convicted of an offense described in section 1128(a)(1) and has been excluded from all federal health care programs.

The I.G. has made the second showing as well. Winther-Galimore acknowledged ownership of WFCC to the Missouri State Board of Chiropractic Examiners. I.G. Ex. 4, at 3; P. Ex. 9, at 3. Her ownership of WFCC is affirmed in other official business filings in the Missouri Secretary of State's office. I.G. Exs. 11 and 12. She appears as WFCC's agent in similar official filings in that office. I.G. Exs. 5 and 6. Both relationships are among those defined at section 1128(b)(8)(A).

Because the I.G. has established a basis for the exclusion of Petitioner Winther Family Chiropractic Center, LLC, pursuant to section 1128(a)(8) of the Act, its exclusion for five years is authorized by 42 C.F.R. § 1001.1001(b)(1). That period is reasonable as a matter of law.

VI. Conclusion

Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law.

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioners Bethany Anne Winther-Galimore and Winther Family Chiropractic Center, LLC, from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years pursuant to

the terms of sections 1128(a)(1) and 1128(b)(8) of the Act, 42 U.S.C. §§ 1320a-7(a)(1) and 1320a-7(b)(8), is sustained.

/s/

Richard J. Smith
Administrative Law Judge