Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rebecca Koontz,
(OI File No. H-16-40536-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-497

Decision No. CR4699

Date: September 7, 2016

DECISION

Petitioner, Rebecca Koontz, was a registered nurse in the State of Indiana. She stole narcotics from her employer, a hospital, and was convicted of unlawful possession of a controlled substance. Pursuant to section 1128(a)(3) of the Social Security Act (Act), the Inspector General (IG) has excluded her from participating in the Medicare, Medicaid, and all federal health care programs for a period of five years.

For the reasons discussed below, I find that the IG is authorized to exclude Petitioner, and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated March 31, 2016, the IG advised Petitioner Koontz that, because she had been convicted of a felony offense related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct in connection with the delivery of a healthcare item or service, the IG was excluding her from participating in Medicare,

Medicaid, and all federal health care programs for a period of five years. IG Ex. 1. Petitioner requested review.

The parties have submitted their written arguments. (IG Br.; P. Br.). With his brief, the IG submitted six exhibits (IG Exs. 1-6); Petitioner submitted seven exhibits (P. Exs. A-G). The IG submitted a reply.

The IG objects to my admitting Petitioner's exhibits because they are marked by letters rather than numbers, contrary to the directions included in my prehearing order. I consider this objection frivolous, particularly considering that Petitioner is appearing pro se. We afford greater latitude to pro se petitioners and certainly would not exclude evidence based on a relatively minor transgression.

The IG also objects to my admitting P. Exs. C through G, arguing that they are irrelevant. The regulations direct me to exclude evidence that is irrelevant or immaterial (42 C.F.R. § 1005.17(c)). I do not consider these documents irrelevant. They address Petitioner's compliance with a court-ordered treatment program, which was a condition of the court's withholding a judgment of conviction. As such, they are relevant for determining the nature of the court's actions.

I admit into evidence IG Exs. 1-6 and P. Exs. A-G.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and, if so, to "describe the testimony it wishes to present, the names of the witnesses it would call, and a summary of each witness's proposed testimony." I specifically directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs at 3 (June 13, 2016); Informal Brief of Petitioner at 2, ¶ III; Informal Brief of Inspector General at 2-3 ¶ III. The IG indicates that an in-person hearing is not necessary. IG Br. at 13. Petitioner did not respond to that question, but she does not contend that an in-person hearing is necessary, and she lists no potential witnesses. I therefore decide this case based on the written record.

Discussion

> ***Petitioner must be excluded from program participation for a minimum of five years because she was convicted of a felony relating to fraud and theft in connection with the delivery of a healthcare item or service.***[1]

[1] I make this one finding of fact/conclusion of law.

Section 1128(a)(3) provides that an individual or entity convicted of felony fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service must be excluded from participation in federal health care programs for a minimum of five years. *See* 42 C.F.R. § 1001.101(c).

Petitioner Koontz was a registered nurse, working at a hospital in Fort Wayne, Indiana, where she had access to the hospital's narcotics. She appropriated some of those narcotics, morphine and hydromorphone, for her personal use. IG Ex. 2 at 2-4; IG Ex. 3. In an information dated July 7, 2015, she was charged with three felony counts of knowingly or intentionally possessing a narcotic drug, morphine, without a valid prescription or order, and two felony counts of possessing the narcotic drug, hydromorphone, without a valid prescription or order. IG Ex. 4.

On September 28, 2015, Petitioner Koontz pled guilty to all five felony counts. IG Ex. 5. The Indiana Superior Court took her guilty plea "under advisement" and placed her in the Drug Court Diversion Program, a pre-sentence, post-plea intervention program. IG Exs. 5, 6. Under the terms of her "participation agreement," her sentencing was deferred pending her completion of the program. She agreed to supervision by the court and by a "case manager" and to comply with a long list of requirements (e.g., attend programs, appear in court as required, not possess alcohol or drugs, submit to random drug testing, etc.). If she violated the terms of her agreement, she would be convicted and sentenced. IG Ex. 6.

Petitioner's felony convictions were plainly related to theft and fraud in connection with the delivery of a health care item (drugs). She stole narcotics from her employer. She is therefore subject to exclusion.

Petitioner, however, argues that, because she entered the Drug Court Diversion Program, no judgment was entered against her. So long as she complies with the program requirements, she will not be convicted.

Under the Act and regulations, a person is "convicted" when "a judgment of conviction has been entered" regardless of whether that judgment has been expunged or otherwise removed. Act § 1128(i)(1); 42 C.F.R. § 1001.2(a)(2). Further, individuals who participate in "deferred adjudication or other program or arrangement where judgment of conviction has been withheld" are also "convicted" within the meaning of the statute. Act § 1128(i)(4); 42 C.F.R. § 1001.2(d). Based on these provisions, the Departmental Appeals Board (Board) characterizes as "well established" the principle that a "conviction" includes "diverted, deferred and expunged convictions regardless of whether state law treats such actions as a conviction." *Henry L. Gupton*, DAB No. 2058 at 8 (2007), *aff'd sub nom. Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008).

The Board explained why, in these I.G. proceedings, the federal definition of "conviction" must apply. That definition differs from many state criminal law definitions. For exclusion purposes, Congress deliberately defined "conviction" broadly to ensure that exclusions would not hinge on the state criminal justice policies. Quoting the legislative history, the Board explained:

> The rationale for the different meanings of "conviction" for state criminal law versus federal exclusion law purposes follows from the distinct goals involved. The goals of criminal law generally involve punishment and rehabilitation of the offender, possibly deterrence of future misconduct by the same or other persons, and various public policy goals. [footnote omitted] Exclusions imposed by the I.G., by contrast, are civil sanctions, designed to protect the beneficiaries of health care programs and the federal fisc, and are thus remedial in nature rather than primarily punitive or deterrent. . . . In the effort to protect both beneficiaries and funds, Congress could logically conclude that it was better to exclude providers whose involvement in the criminal system raised serious concerns about their integrity and trustworthiness, even if they were not subjected to criminal sanctions for reasons of state policy.

Gupton, at 7-8.

Petitioner also explains that she has complied with all requirements, is clean and sober, and was not aware of the ramifications of her entering the drug program. I accept these assertions as true; however they are not bases for overturning a mandatory exclusion.

Because Petitioner's conviction falls squarely within the statutory and regulatory definition of "conviction," she is subject to exclusion. An exclusion brought under section 1128(a)(3) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and I sustain the five-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge