Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rhonda Louk Kuehn,
(OI File No. H-15-4-0168-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-2085

Decision No. CR4217

Date: September 15, 2015

DECISION

Petitioner, Rhonda Louk Kuehn, was a nurse, licensed in the State of Texas. She pled guilty to one misdemeanor count of theft, admitting that she submitted false claims to the Medicaid program. Based on this, the Inspector General (I.G.) has excluded her for five years from participating in Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(1) of the Social Security Act (Act). Petitioner appeals the exclusion. For the reasons discussed below, I find that the I.G. properly excluded Petitioner Kuehn and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated February 27, 2015, the I.G. notified Petitioner that she was excluded from participating in Medicare, Medicaid, and all federal health care programs for a period of five years because she had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or state health care program. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. I.G. Ex. 1. Petitioner requested review.

Each party submitted a written argument (I.G. Br.; P. Br.). The I.G. submitted five exhibits (I.G. Exs. 1-5). Petitioner submitted 14 exhibits which she marked P. Exs. 2-15.[1] In the absence of any objection, I admit into evidence I.G. Exs. 1-5 and P. Exs. 2-15.

The parties agree that an in-person hearing is not necessary. I.G. Br. at 5; P. Br. at 3.

Discussion

> ***Petitioner must be excluded from program participation for a minimum of five years, because she was convicted of a criminal offense 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).***[2]

Under section 1128(a)(1) of the Act, the Secretary of Health and Human Services must exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. 42 C.F.R. § 1001.101(a).

Here Petitioner Kuehn was a private duty nurse, caring for Medicaid-eligible children in the state foster care program. She submitted claims to the Texas Medicaid program for hours of private duty nursing that she could not have and did not provide. I.G. Exs. 2, 4. On December 15, 2014, a Texas state court accepted her guilty plea to charges of theft. I.G. Ex. 2. Although initially charged with felony theft, it appears that, pursuant to a plea agreement, the conviction was reduced to a misdemeanor and that she was granted deferred adjudication and placed on six months supervision. The court also ordered her to pay $162 in court costs and $5,830 in restitution. I.G. Ex. 2 at 1; I.G. Ex. 3.

Petitioner maintains that, because of the deferred adjudication, she was not convicted of a criminal offense. P. Br. at 1, 2. From the face of the conviction documents, I cannot tell whether the terms of her deferred adjudication reduced her felony charge to a misdemeanor conviction, or, as Petitioner maintains, eliminated the charges entirely. For purposes of this exclusion, however, it doesn't matter. The statute and regulations provide that 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). 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

[1] Petitioner did not submit an exhibit marked P. Ex. 1.

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

C.F.R. § 1001.2(d). Based on these provisions, the Departmental Appeals 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 complains that she would not have agreed to a guilty plea had she understood that it would result in exclusion from program participation. She blames her employer for the fraud that underlay her conviction, and explains why, in her view, her conduct was defensible. P. Br. at 2-4. The regulations explicitly preclude any collateral attack on an underlying 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); *Donna Rogers*, DAB No. 2381 at 4-5 (2011); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380 at 8 (1993) ("There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions."); *Young Moon, M.D.*, DAB CR 1572 (2007).

Petitioner also submits evidence attesting to her character and qualifications, and discusses the impact the exclusion has on her ability to work in the healthcare field. P. Br. at 1, 4; *see* P. Exs. 2-15. Such arguments are not relevant. My authority is constrained by the regulations, and I may not review the I.G.'s decision to impose a mandatory exclusion "on the ground that the excluded person is a good person or well-thought of in the profession or suffering from the loss of his/her vocation." *Donna Rogers*, DAB No. 2381 at 6.

Finally, an exclusion brought under section 1128(a)(1) must be for a minimum period of five years, so the length of exclusion here is not reviewable. 42 C.F.R. § 1001.2007(a)(2).

Conclusion

Because she was convicted of a criminal offense related to the delivery of any item or service under a state health care program (Medicaid), Petitioner Kuehn must be excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years.

/s/
Carolyn Cozad Hughes
Administrative Law Judge