

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Amilcar Alberto Alves,
(OI File No.: H-17-40639-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-855

Decision No. CR4968

Date: November 15, 2017

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Amilcar Alberto Alves, from participating in Medicare and other federally funded health care programs for a minimum period of five years.

I. Background

The I.G. filed a brief and a reply brief in support of his exclusion determination, plus seven proposed exhibits identified as I.G. Exhibit (Ex.) 1-I.G. Ex. 7. Petitioner did not file a brief but filed two exhibits, identified as P. Ex. 1 and P. Ex. 2. I receive the parties' exhibits into the record. In deciding this case I address the argument that Petitioner raised in his hearing request: that he was not convicted of a criminal offense and that, consequently, there is no statutory basis to exclude him.

II. Issues, Findings of Fact and Conclusions of Law

A. Issue

The issue in this case is whether Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Social Security Act (Act).

B. Findings of Fact and Conclusions of Law

The I.G. excluded Petitioner on the authority of section 1128(a)(2) of the Act, a section that mandates exclusion of any individual who is convicted of a criminal offense relating to patient abuse in connection with the delivery of a health care service. The I.G. excluded Petitioner for at least five years, the minimum period required for exclusions imposed pursuant to section 1128(a)(2). Act, § 1128(c)(3)(B).

In his hearing request Petitioner asserted that he had not been convicted of a crime. Petitioner's assertion notwithstanding, the evidence unequivocally establishes that Petitioner was convicted of a crime as is defined by the Act. On November 30, 2016, Petitioner entered a plea of nolo contendere to a criminal charge in a Rhode Island State court. I.G. Ex. 2-I.G. Ex. 4. The court that accepted Petitioner's plea entered a judgment that is effectively a deferred adjudication: it withheld a judgment of conviction pursuant to conditions that included the requirement that Petitioner not be convicted of any other crime during a period of one year. The court stated that it would vacate Petitioner's plea assuming fulfillment by Petitioner of the conditions of his deferred adjudication. I.G. Ex. 5.

The Act defines a conviction of a crime to include a plea of nolo contendere or any arrangement in the nature of a deferred adjudication. Act, §§ 1128(i)(3), 1128(i)(4). In doing so, the Act plainly defines convictions to include a plea arrangement in which a defendant is promised that his or her plea will be vacated conditioned on good behavior or on the satisfaction of other conditions. The evidence offered by the I.G. proves that Petitioner entered into precisely the type of arrangement described by the Act.

Petitioner argues that he was not convicted of a crime within the meaning of Rhode Island law. That may be so, but if it is, it does not preclude his exclusion. In determining whether an individual is convicted for purposes of section 1128(a)(2), the Act's definition of a conviction is paramount. It trumps State law. Thus, the fact that a plea or a deferred adjudication arrangement may not constitute a conviction under State law does not serve to bar exclusion if that plea or deferred adjudication arrangement satisfies the Act's definition of a conviction.

All of the elements of an 1128(a)(2) offense exist in this case. Evidence offered by the I.G. proves that Petitioner was: (1) convicted of a crime; (2) relating to patient abuse;

and (3) in connection with the delivery of a health care service. The criminal information to which Petitioner entered his plea charged him with committing an act of abuse against an individual who resided in a nursing facility. I.G. Ex. 7. The predicate for that charge was an allegation that Petitioner, an employee of a nursing facility, had physically restrained a demented resident of the facility in order to forcibly administer medication to that resident. I.G. Ex. 8.

Petitioner seems to argue that, even if he was convicted of a section 1128(a)(2) offense, he was not actually guilty of any crime. That appears to be the purpose of his filing P. Ex. 1 and P. Ex. 2, exhibits that relate to State disciplinary proceedings against Petitioner. Apparently, the administrative body that reviewed Petitioner's case decided that there was not sufficient proof of abuse to warrant State disciplinary action against Petitioner.

But, Petitioner's assertion that he is not guilty of a crime provides him with no defense against exclusion. His assertion amounts to a collateral attack on the conviction that was imposed in his case because he is effectively arguing that he is not really guilty of a crime and that therefore section 1128(a)(2) is inapplicable. The exclusion requirement of section 1128(a)(2) derives from Petitioner's conviction of a crime and not from his underlying guilt or innocence. I have no authority to address the merits of the charges against Petitioner that resulted in his conviction nor may Petitioner collaterally attack his conviction before me. 42 C.F.R. § 1001.2007(d).

_____/s/_____
Steven T. Kessel
Administrative Law Judge