

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Cece J. Monemou,)	Date: November 8, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-613
)	Decision No. CR1685
The Inspector General.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Cece Monemou, from participating in Medicare, State Medicaid programs, or other federally funded health care programs for a period of at least five years.

I. Background

On May 31, 2007 the I.G. notified Petitioner of his exclusion. The basis that the I.G. stated for the exclusion was that Petitioner had been convicted of a criminal offense as is described at section 1128(a)(2) of the Social Security Act (Act).

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference and, at that conference, assigned deadlines to the parties for submissions of briefs and proposed exhibits. I informed the parties that I would schedule an in-person hearing if either of them requested one, and satisfied me that he had testimony to present at a hearing that was relevant and not cumulative.

Each party filed a proposed brief. Neither party requested that I convene an in-person hearing. I offered the I.G. the opportunity to file a reply brief but the I.G. informed me that he saw no need to do so.

The I.G. filed four proposed exhibits with his brief which he designated as I.G. Exhibit (Ex.) 1 - I.G. Ex. 4. Petitioner filed one proposed exhibit to which he did not designate with an exhibit number. The exhibit is Petitioner's sworn statement, dated October 19, 2007. For purposes of the record I identify it as Petitioner (P.) Ex. 1. Petitioner objected to my receiving I.G. Ex. 1 - I.G. Ex. 3 into evidence. I overrule the objections and I receive into evidence I.G. Ex. 1 - I.G. Ex. 4. I explain my rationale for overruling the objections below, at Finding 1 of this decision. Additionally, I receive into evidence P. Ex. 1.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Petitioner was convicted of a crime that requires his exclusion pursuant to section 1128(a)(2) of the Act; and
2. Assuming the I.G. was required to exclude Petitioner, his five-year exclusion is mandatory.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading.

1. The I.G. must exclude Petitioner because he was convicted of a crime that requires his exclusion pursuant to section 1128(a)(2) of the Act.

On December 21, 2006 in a Rhode Island State court Petitioner entered a plea of nolo contendere to a charge of simple assault. I.G. Ex. 4, at 1. Petitioner entered his plea in order to avoid prosecution for, and possible conviction of, a more serious crime. That alleged crime was set forth in a criminal information that had been issued against Petitioner charging that he had abused a resident of a group home by committing an assault and battery against that resident. I.G. Ex. 1, at 1.

The criminal information was supported by a police narrative and a witness statement that set forth the allegations against Petitioner. I.G. Ex. 2; I.G. Ex. 3. Petitioner had been employed as a caregiver at a group home. On December 27, 2005, according to a witness, Petitioner grabbed a group home resident by his ears, pulled him from his seat, and walked him out of the room that the resident had been seated in by pulling on the resident's left ear. I.G. Ex. 2, at 1.

Section 1128(a)(2) of the Act mandates exclusion of any individual who was convicted of a criminal offense relating to patient abuse in connection with the delivery of a health care item or service. All of the requisite elements of an 1128(a)(2) offense are established in this case by the exhibits pertaining to the charges that were filed originally against Petitioner and his subsequent plea of nolo contendere to a charge of simple assault.* On the strength of these exhibits, Petitioner was: engaged in delivering health care items or services as an employee of a group home; he committed an abusive act against a patient (a resident of the group home); and he was convicted of an offense that is based on the original charges. On the face of these exhibits, therefore, the I.G. has proven a basis for exclusion pursuant to section 1128(a)(2).

Petitioner argues, however, that the exhibits relating to the original charges filed against him, I.G. Ex. 1 - I.G. Ex. 3, are irrelevant to the issue of whether he was convicted of an 1128(a)(2) offense. According to Petitioner, the authority to exclude – if there is such authority – would derive solely from his conviction. And, here, he asserts, I.G. Ex. 4 proves only that his conviction was of a simple assault against an unnamed person under unknown circumstances. Petitioner asserts that one may not look behind that conviction for simple assault to decide the underlying circumstances on which the conviction is based for the reason that the plea that he entered is silent as to those circumstances.

I disagree with Petitioner's analysis. His argument avoids the obvious connection between the crime of which he was charged and the reduced crime to which he pled. The crime of simple assault to which he pled was not conjured from thin air. Rather, it was based on the facts that underlay the charges filed against him originally. The crime to which Petitioner pled nolo contendere may have been a *reduced* offense but it was supported by the *identical facts* which supported the original charges that had been filed against him. It is well-established that, in determining the elements of a crime for purposes of deciding whether authority exists to exclude, one may look at the facts that form the basis for the charges that are filed against the excluded party. The often opaque language of a plea agreement or a judgment of conviction will be no impediment to finding authority to exclude where the agreement or judgment is clearly supported by other official records that lay out the elements of the crime.

It might be different had Petitioner been convicted of a crime that was, on its face, totally unrelated to the allegations made in the original criminal information. In that circumstance it would not be possible to find a nexus between what was charged and the crime to which Petitioner pled. But here, the nexus is patent.

* Section 1128(i)(3) of the Act defines a conviction to include a plea of nolo contendere that is accepted by a court. Petitioner's plea of nolo contendere therefore has the same consequences under section 1128 as would a conviction after a trial.

Petitioner offered P. Ex. 1, which consists of his sworn statement in which he essentially denies that he assaulted the resident, as apparent proof that he was not actually guilty of an assault. He contends, evidently, that he should be allowed to offer this evidence to rebut I.G. Ex. 1 - I.G. Ex. 3, on the theory that if I am inclined to “look behind” his conviction for simple assault then, I should also accept his denial that he perpetrated an assault.

The authority to exclude in this case derives from Petitioner’s conviction. The conviction – and those official records relating to it – define the basis for the exclusion. It is not permissible in a case such as this one to relitigate the facts underlying the conviction in order to decide whether the excluded individual, in fact, committed the offense for which he or she was convicted.

My reliance on the official records pertaining to the information filed against Petitioner and his subsequent nolo contendere plea to a reduced but related offense is in no sense a relitigation of the facts of his case. The I.G.’s exhibits consist solely of the official record of Petitioner’s criminal case and I have accepted them only to decide what Petitioner was charged with, what he ultimately pled to, and the facts that underlay his conviction. By contrast, P. Ex. 1 is a document that is *outside* of the official record of Petitioner’s conviction and is, therefore, not relevant to the issue of what he was charged with and pled to. Consequently, the assertions now made by Petitioner in P. Ex. 1 are no basis for me to find the I.G. to be without authority to exclude him.

2. Petitioner’s five-year exclusion is mandatory.

An exclusion of at least five years is mandatory for an individual who has been convicted of an offense that is described at section 1128(a)(2) of the Act. Act, § 1128(c)(3)(B). Petitioner’s exclusion is reasonable as a matter of law inasmuch as he was excluded for the minimum mandatory period.

/s/
Steven T. Kessel
Administrative Law Judge