

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jennifer L. Stack,
(O.I. File No. H-13-43011-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1149

Decision No. CR3494

Date: December 5, 2014

DECISION

Petitioner, Jennifer L. Stack, appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude her from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(3) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(3)) for a period of five years due to her felony convictions in Ohio state court. Although the I.G. had a basis to exclude Petitioner under section 1128(a)(3) of the Act at the time he issued the exclusion notice, the state court subsequently vacated Petitioner's felony convictions, and Petitioner pled guilty to a misdemeanor. For the reasons discussed below, I find that the I.G. no longer has a basis to exclude Petitioner pursuant to section 1128(a)(3), which requires a felony conviction. Accordingly, I reverse the I.G.'s exclusion of Petitioner.

I. Background and Procedural History

Petitioner was a Licensed Practical Nurse employed by Fairview Hospital in Cleveland, Ohio. I.G. Exhibit (I.G. Ex.) 3, at 2; I.G. Ex. 4, at 1-2; I.G. Ex. 5, at 1. On October 28, 2011, Petitioner gave her employer a specimen for drug screening, which tested positive

for hydromorphone, a narcotic pain medication that is available only by prescription. I.G. Ex. 3, at 2-4. The Ohio Board of Nursing conducted an investigation and suspended Petitioner's license.¹ During the investigation, Petitioner admitted that she abused pain medication prescribed to her husband, including Percocet, Vicodin, and Dilaudid. I.G. Ex. 5, at 2. Petitioner also admitted that she abused pain medication that she accessed from the waste containers at Fairview Hospital. I.G. Ex. 5, at 3-5.

On March 7, 2012, the Ohio Board of Nursing referred Petitioner's case to the Cuyahoga County Prosecutor's Office for possible criminal prosecution because Petitioner diverted Percocet and Vicodin from Fairview Hospital for personal use. I.G. Ex. 6. The grand jury returned indictments on three felony counts: two counts of felony theft in the fourth degree for stealing Vicodin and Percocet from Fairview Hospital and one count of felony drug possession of Percocet. I.G. Ex. 7, at 1-2.

On October 16, 2012, Petitioner pled guilty to each of the three felony counts as charged, but the state court did not make any findings of guilt at that time. I.G. Ex. 8. Instead, the state court granted Petitioner's motion for Intervention in Lieu of Conviction (ILC), a first-offender, deferred adjudication program. *Id.* The state court placed Petitioner on supervised probation under the ILC program for one year. *Id.* After successful completion of the program, the state court dismissed all charges against Petitioner. Informal Brief of Petitioner Jennifer L. Stack (P. Br.) at 3.

By letter dated April 30, 2014, the I.G. notified Petitioner that she was being excluded from Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(3) of the Act. I.G. Ex. 1, at 1. The letter explained that the exclusion related to her felony conviction in the Court of Common Pleas, Cuyahoga County, Ohio, of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct either: 1) in connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such items or services; or 2) with respect to any act or omission in a health care program (other than Medicare and a state health care program) operated by, or financed in whole or in part, by any federal, state or local government agency. *Id.* The letter advised Petitioner that she may file a written request for hearing within 60 days of receipt of the letter. *Id.* at 3.

Petitioner timely filed a request for hearing on May 17, 2014, and the case was assigned to me for hearing and decision. I convened a prehearing telephone conference with the parties, which I summarized in my Order and Schedule for Filing Briefs and

¹ Petitioner did not contest her license suspension by the Ohio Board of Nursing. I.G. Ex. 4, at 1.

Documentary Evidence dated June 9, 2014 (Sched. Order). Pursuant to that order, I asked the parties to answer the questions on the short-form briefs sent to them, and I allowed the parties to present any additional arguments and to provide supporting documents. The I.G. filed his short-form brief (I.G. Br.) together with I.G. Exs. 1 through 8 on July 8, 2014.

On August 5, 2014, three days before the deadline for filing her brief, Petitioner moved the Cuyahoga County Court of Common Pleas to vacate her October 16, 2012, guilty pleas in order “to correct manifest injustice.” Petitioner’s Exhibit (P. Ex.) C at 1.² In her supporting brief for vacatur, Petitioner argued that had she “been aware that her plea to the indictment would result in her exclusion by the OIC [sic] from participating in Medicare and all federal healthcare programs, she unequivocally would not have entered such a plea.” *Id.* at 2.

On the following day, August 6, 2014, the state court judge convened a hearing on Petitioner’s motion. P. Ex. A. The state prosecutor did not oppose the motion, and the state court granted the motion to vacate Petitioner’s guilty pleas. *Id.* The state court reopened the original three felony counts, and Petitioner pled guilty to a single amended charge of disorderly conduct, a misdemeanor under Ohio law. P. Ex. B; OHIO REV. CODE ANN. § 2917.11(A)(2) (West 2014). The state court accepted the prosecutor’s nolle prosequi of the remaining two felony charges in the original indictment. P. Ex. B.

On August 8, 2014, Petitioner submitted a brief, together with exhibits A and B. The I.G. subsequently submitted a reply brief (I.G. Reply). Petitioner moved to file a surreply, which I granted and further ordered Petitioner to file a copy of the Motion to Vacate Guilty Plea submitted to the Ohio state court. In addition to her surreply (P. Surreply), Petitioner filed a Notice of Supplementing the Record along with the Motion to Vacate Guilty Plea identified as P. Ex. C.

Absent objections from either party, I admit I.G. Exs. 1-8 and P. Exs. A-C. Neither party requested a hearing to examine witnesses. I.G. Br. at 9; P. Br. at 1. Accordingly, I decide this case on the written record.

II. Discussion

A. Issue

The scope of my review is limited. 42 C.F.R. § 1001.2007(a)(1) and (2). The only issue before me is whether the I.G. has a basis for excluding Petitioner from participating in

² Pinpoint cites to P. Ex. C correspond to the page numbers in “Petitioner’s Brief in Support,” which Petitioner filed with the motion to vacate as one exhibit.

Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(3) of the Act. If I find that the I.G. is authorized to exclude Petitioner, then I must uphold the I.G.'s exclusion because it is for the minimum mandatory period of five years pursuant to the statute. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

B. Findings of Fact and Conclusions of Law

1. The I.G. had a legitimate basis for excluding Petitioner under section 1128(a)(3) of the Act when he issued the April 30, 2014 exclusion letter.

The four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, or the felony offense must have been with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the felonious conduct must have occurred after August 21, 1996. *See* 42 C.F.R. § 1001.101(c).

Both parties agree that the I.G. had a basis to exclude Petitioner under section 1128(a)(3) when he issued the exclusion notice on April 30, 2014. P. Br. at 3-4; I.G. Br. at 4. There is no dispute that, on October 16, 2012, Petitioner pled guilty to three felonies, including two counts of aggravated theft and one count of drug possession for stealing prescription pain medication from her employer, Fairview Hospital, on or about October 1, 2011. I.G. Exs. 7, 8. Although the court dismissed Petitioner's charges after she successfully completed the first-offender ILC program, the court's acceptance of Petitioner's guilty pleas constitutes a "conviction" under section 1128(i) of the Act. 42 U.S.C. § 1320a-7(i)(4); *Ellen L. Morand*, DAB No. 2436, at 4-6 (2012). Thus, all elements for establishing a basis for excluding Petitioner pursuant to section 1128(a)(3) were satisfied when the I.G. issued the exclusion letter: (1) the state court convicted Petitioner of three felony offenses; (2) two of the felony offenses were for theft; (3) the felony offenses were in connection with the delivery of a health care item or service because Petitioner stole narcotic drugs from the hospital where she worked as a nurse; and (4) Petitioner's felony offenses occurred after August 21, 1996.

However, during the course of this administrative proceeding, an Ohio state court judge vacated Petitioner's felony guilty pleas, which as discussed below, necessarily affects the outcome of this case.

2. After the I.G. issued the exclusion notice, the Ohio state court vacated the felony convictions serving as the I.G.'s basis for Petitioner's exclusion under section 1128(a)(3) of the Act.

Nearly two years after her conviction, on August 5, 2014, Petitioner asked the state court to vacate her guilty pleas pursuant to Rule 32.1 of the Ohio Rules of Criminal Procedure. In that state court proceeding, Petitioner claimed that she would not have entered guilty pleas to the three felony counts if she had known that “her plea to the indictment would result in her exclusion.” P. Ex. C, at 2.

Rule 32.1 authorizes the Ohio state court to “set aside the judgment of conviction and permit the defendant to withdraw his or her plea” after sentencing in order “to correct manifest injustice.” OHIO R. CRIM. P. 32.1; *see also State v. Lababidi*, 969 N.E.2d 335, 336 (Ohio Ct. App. 2012) (citing *State v. Smith*, 361 N.E.2d 1324 (Ohio 1977)). Granting a post-sentencing request to withdraw a guilty plea is an extraordinary remedy. *State v. Sneed*, No. 80902, 2002 WL 31667630 at *3 (Ohio Ct. App. Nov. 27, 2002) (explaining that Rule 32.1 “imposes a strict standard for deciding a post-sentence motion to withdraw a plea” and is permissible only in “extraordinary cases”). Defendants must satisfy a high burden, and the court will only grant such requests in the rarest circumstances:

When the defendant moves to withdraw his or her guilty plea after sentence has been imposed, however, the trial judge will set aside the judgment of conviction and permit the defendant to withdraw his or her plea only to correct manifest injustice. The “manifest injustice” which the defendant must demonstrate to support the withdrawal of a guilty plea is injustice that is obvious, directly observable, overt, and not obscure. The purpose of this stringent standard is to prevent the defendant from testing the weight of potential punishment, and then withdrawing the plea if he or she finds the sentence unexpectedly severe. . . .

22 C.J.S. *Criminal Law* § 534 (2014) (citations omitted); *see also Sneed*, 2002 WL 31667630, at *3. Thus, the Ohio state court will vacate a guilty plea only upon a showing of “an extraordinary and fundamental flaw in the plea proceeding.” *Sneed*, 2002 WL 31667630, at *3 (citation omitted).

The Ohio state court determined that Petitioner met this high standard and granted her unopposed motion. P. Exs. A, B. The state court vacated Petitioner’s guilty pleas and, consequently, her felony convictions. P. Exs. A, B. The prosecutor withdrew the original felony counts and charged Petitioner with a single count of disorderly conduct, a

“minor misdemeanor” under Ohio state law. OHIO REV. CODE ANN. § 2917.11(E)(2) (West 2014). Petitioner pled guilty to the misdemeanor. P. Ex. B.

My review here “is not limited to specific items and information set forth in the notice letter,” and the regulations authorize me to consider “additional items and information, including aggravating or mitigating circumstances that arose or became known subsequent to the issuance of the notice letter[.]” 42 C.F.R. § 1005.15(f)(1). Additionally, the ability to consider new evidence is consistent with my authority to determine whether “[t]he basis for the imposition of the sanction *exists*[.]” 42 C.F.R. § 1001.2007(a)(1)(i) (emphasis added). Notably, the regulatory standard of review is in the present tense and is not limited to the time at which the I.G. issued the notice of exclusion. Therefore, I will consider Petitioner’s new evidence indicating that the Ohio state court vacated her felony convictions. P. Exs. A-C.

3. The state court vacated Petitioner’s felony convictions based on grounds of manifest injustice rather than Petitioner’s successful completion of a deferred adjudication program.

The parties disagree about the nature and effect of Petitioner’s vacated guilty pleas. The I.G. claims that “upon Petitioner’s successful completion of the ILC program, her guilty plea was vacated and she was permitted to enter a plea of guilty to a misdemeanor offense.” I.G. Reply at 4. The I.G. asserts that Petitioner’s vacated plea resulted from her participation in a deferred adjudication program, and pursuant to section 1128(i) of the Act and related case law, this constitutes a conviction under section 1128(a)(3) of the Act. I.G. Reply at 1-2 (citing *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994); *Henry L. Gupton*, DAB No. 2058 (2007), *aff’d sub nom. Gupton v. Leavitt*, 575 F.Supp.2d 874 (E.D. Tenn. 2008), among others); *see also* I.G. Reply at 4-5.

The I.G. further asserts that Congress intended only “to except convictions vacated on appeal, or based on the merits of the case, from the definition of ‘conviction’ under the Act.” I.G. Reply at 4 (citing *Gupton*, DAB No. 2058, at 12 and *Michael J. Kirkland, D.C.*, DAB CR263 (1993)). Arguing that the state court vacated Petitioner’s conviction upon successful completion of the ILC program and not on appeal or on its merits, the I.G. asserts that Petitioner has “a conviction of a felony offense within the meaning of section 1128(a)(3) of the Act[,] and “the I.G.’s exclusion of Petitioner . . . is legally supportable.” I.G. Reply at 5.

In sharp contrast, Petitioner contends that the state court did not vacate her guilty pleas because of the ILC deferred adjudication program. P. Surreply at 1-3. Rather, she claims the state court vacated her pleas based on Petitioner’s August 5, 2014 Motion to Vacate Pleas, “which is a separate and discrete event.” *Id.* at 3. The legal ground argued in Petitioner’s motion, and relied upon by the state court in granting her motion, was “to

correct manifest injustice – to wit: her plea was constitutionally defective because it was not made knowingly, intelligently, and voluntarily.” *Id.* at 2.

Petitioner further states that her vacated conviction is categorically different than convictions that a state court expunges or dismisses pursuant to a deferred adjudication. P. Br. at 3. As such, her vacated conviction falls within the type of actions Congress exempted from the Act’s broad definition of “conviction.” P. Surreply at 5.

The evidence establishes that Petitioner’s vacated guilty pleas did not stem from her participation in a deferred adjudication program. Petitioner submitted state court records that are consistent with her claim that the court vacated her guilty pleas based on her Motion to Vacate Guilty Plea. The Court of Common Pleas for Cuyahoga County, Ohio, Journal Entry dated August 6, 2014, expressly states that a “hearing [was] held on Defendant’s 8-5-2014 Motion to Vacate Plea, entered 10-16-2012,” and that the “motion is unopposed and granted.” P. Ex. A. The date of filing stamped on Petitioner’s Motion to Vacate Guilty Plea is August 5, 2014. P. Ex. C. That motion seeks vacatur “pursuant to Rule 32.1 of the Ohio Rules of Criminal Procedure” and the brief argues that the state court must vacate Petitioner’s pleas to “[c]orrect a [m]anifest [i]njustice.” P. Ex. C at 1.

Petitioner explains in her brief filed with the motion to vacate that the impetus for filing the motion was the I.G.’s exclusion determination: she “would not have entered such a plea” if she had known that it “would result in her exclusion.” P. Ex. C at 2. Petitioner also indicated that the “State of Ohio would very likely agreed [sic] to amend the indictment to include charges that would not expose [Petitioner] to exclusion by the OIC [sic].” *Id.* That is precisely what the state did after the court vacated Petitioner’s guilty pleas. P. Ex. B (showing that the prosecutor amended the indictment to include a single count of disorderly conduct pursuant to OHIO REV. CODE ANN. § 2917.11(A)(2)). The I.G. has not presented any evidence discrediting the state court records or otherwise demonstrating that Petitioner’s guilty plea to the amended charge resulted from her participation in the ILC program or any other arrangement where the state court withheld judgment of conviction.

Although Congress enacted a broad definition of the term “conviction,”³ it expressly excepted convictions that are vacated outside of the deferred adjudication process and similar programs:

³ Section 1128(i) broadly defines conviction to protect federal health care programs. When Congress amended the Act in 1987, it recognized that relying on state law definitions of “conviction” undermined the purpose of the Act by allowing individuals with dismissed convictions pursuant to first-offender or deferred adjudication programs to continue in the program, even though they admitted guilt. The congressional committee stated, however, “[i]f the financial integrity of Medicare and Medicaid is to be

With respect to convictions that are ‘expunged,’ the Committee intends to include all instances of conviction which are removed from the criminal record of an individual for any reason *other than the vacating of the conviction itself, e.g., a conviction which is vacated on appeal*. The Committee wishes to emphasize that, if a conviction is overturned or vacated on appeal, the individual can no longer be excluded from the Medicare and Medicaid programs (unless, of course, he or she has been excluded on grounds independent of such conviction).

H.R. Rep. No. 99-727, at 75 (1986) *reprinted in* 1986 U.S.C.C.A.N. 3607, 3665 (emphasis added). The legislative history explains that Congress did not intend to exclude individuals if courts later determined their prior convictions were erroneous, and therefore, vacated them. When specifically referencing “a conviction which is vacated on appeal,” the legislative history cites one example of “vacating of the conviction itself.” The legislative committee prefaced the language “a conviction which is vacated on appeal” with the abbreviation “e.g.,” meaning “for example.” Thus, the legislative committee recognized that there are several ways in which a court may vacate a conviction itself and did not appear to intend for vacatur on appeal to be the exclusive situation.

The state court’s vacatur of Petitioner’s guilty pleas on manifest injustice grounds nullified the prior convictions that served as the basis of the I.G.’s April 30, 2014 exclusion notice. Like a conviction that is vacated on appeal, Petitioner’s case returned to its original posture after the state court vacated her guilty pleas – as if the state court never accepted Petitioner’s guilty pleas and never granted deferred adjudication under the Ohio ILC program. The state court amended the original indictment, advised her of her constitutional rights and potential penalties, and Petitioner pled guilty to a new charge – misdemeanor disorderly conduct. P. Ex. B.

protected, the programs must have the prerogative not to do business with those who have pleaded to charges of criminal abuse against them.” H.R. Rep. No. 99-727, at 75 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3607, 3665. Otherwise, the statute would be “essentially toothless since all but the most fraudulent would avoid exclusion.” *Gupton*, 575 F.Supp.2d at 881 n.7. Therefore, the Act defines “convictions” to include not only adjudications of guilt and pleas of guilty or nolo contendere, but also judgments that courts expunge or withhold due to participation in a first-offender, deferred adjudication, or other similar program. 42 U.S.C. § 1320a-7(i).

4. *The I.G. has no current basis to exclude Petitioner pursuant to section 1128(a)(3) of the Act because her conviction of disorderly conduct is not a felony offense.*

In order for me to sustain an exclusion pursuant to section 1128(a)(3), Petitioner must have a felony conviction. 42 U.S.C. § 1320a-7(a)(3) (requiring the Secretary to exclude an individual “that has been convicted . . . of a criminal offense consisting of a *felony*”) (emphasis added). Petitioner’s guilty plea to disorderly conduct is not a felony conviction. Petitioner pled guilty to a single count of disorderly conduct pursuant to section 2917.11(A)(2) of the Ohio Revised Code. P. Ex. B. Ohio state law unambiguously states that “disorderly conduct is a minor misdemeanor.” OHIO REV. CODE ANN. § 2917.11(E)(2). Although it is not necessary to look beyond the state’s classification in this instance, application of federal law also dictates that Petitioner’s offense is not a felony. Federal law classifies an offense as a felony if it carries a potential maximum prison term of more than one year. 18 U.S.C. § 3559(a) (2014); *see also Amir Tadros*, DAB No. 2550, at 6 (2013). Petitioner’s conviction of disorderly conduct is not subject to any prison or jail sentence. OHIO REV. CODE ANN. § 2929.26(D) (West 2014) (stating that Ohio courts shall not sentence any person to a prison term or jail term for a minor misdemeanor). Because Petitioner’s disorderly conduct conviction is not subject to *any* prison or jail term, and certainly not more than a year of imprisonment, Petitioner’s offense is not a felony.

In finding that Petitioner has not been convicted of a “felony,” I conclude that the I.G. has not met his burden of proving that a legal basis still exists for excluding Petitioner pursuant to section 1128(a)(3) of the Act. Sched. Order at 2; *see generally Subramanya K. Prasad, M.D.*, DAB No. 2568, at 6 (2014) (finding no error where the I.G. bore the burden of proof and persuasion on all issues other than affirmative defenses or mitigating factors). In contrast, sections 1128(a)(1) and 1128(a)(2) of the Act do not include the term “felony.” 42 U.S.C. §§ 1320a-7(a)(1)-(2) (requiring exclusion only where an individual has been convicted of “a criminal offense” related to program fraud or patient abuse). In such cases, Congress decided that program-related and patient abuse crimes are so egregious that they warrant mandatory exclusion regardless of whether the offense is a felony or misdemeanor. Likewise, Congress easily could have broadened the scope of 1128(a)(3) to reach misdemeanors. Instead, it decided to expressly require a felony conviction for a mandatory exclusion under section 1128(a)(3).

5. *I am not authorized to consider whether other possible bases exist for the I.G. to exclude Petitioner.*

The I.G. did not amend or supplement the statutory basis for the exclusion after he received notice that the Ohio state court vacated Petitioner’s felony convictions. *Cf. Tadros*, DAB No. 2550, at 3 n.4 (finding no legal error where the I.G. changed the

statutory basis for the exclusion during the administrative law judge proceeding). Thus, I limit my review to whether the I.G. has authority to exclude Petitioner under section 1128(a)(3) of the Act. Accordingly, I only decide, under the narrow circumstances of this case, that the I.G. no longer has a basis to exclude Petitioner pursuant to section 1128(a)(3) of the Act. I do not decide here whether the I.G. currently has a basis or authority to exclude Petitioner pursuant to other provisions of section 1128 of the Act.

III. Conclusion

For the foregoing reasons, I reverse the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and other federal health care programs. I find that the I.G. no longer has a basis to exclude Petitioner, with regard to her vacated felony convictions, pursuant to section 1128(a)(3) of the Act. Petitioner's reinstatement is retroactive to the May 20, 2014 effective date of the I.G.'s exclusion. *See* 42 C.F.R. §§ 1001.3005(a)(3), 1005.20(b); I.G. Ex. 1, at 1.

/s/

Joseph Grow
Administrative Law Judge