

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Lori Rae Johanesen-McEwen
(OI File No. H-11-41929-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-636

Decision No. CR2667

Date: November 21, 2012

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Lori Rae Johanesen-McEwen, from participating in Medicare, Medicaid, and other federally funded health care programs for a period of five years. I find that the I.G. is authorized to exclude Petitioner pursuant to sections 1128(a)(3) and 1128(a)(4) of the Social Security Act (Act) (42 U.S.C. §§ 1320a-7(a)(3), 1320a-7(a)(4)) and that the five-year exclusion is the minimum mandatory period of exclusion pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background

Petitioner is a pharmacist who pled guilty to felony charges relating to deceptively obtaining prescription drugs without authorization from a prescriber. In a letter dated February 29, 2012, the I.G. notified Petitioner that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to sections 1128(a)(3) and 1128(a)(4) of the Act. The basis cited for Petitioner's exclusion pursuant to section 1128(a)(3) was her felony convictions in the Court of Common Pleas, Stark County, Ohio, of criminal

offenses related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. The basis cited for Petitioner's exclusion pursuant to section 1128(a)(4) was her felony convictions, in the same court, of criminal offenses related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under federal or state law. Petitioner timely requested a hearing on April 28, 2012. The case was assigned to me for hearing and decision.

On June 4, 2012, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence, dated June 4, 2012.

The I.G. filed a brief (I.G. Br.) on August 3, 2012, with the I.G.'s exhibits (I.G. Exs.) 1 through 8. Petitioner filed a response (P. Br.) on September 6, 2012, with Petitioner's exhibits (P. Exs.) 1 through 7. The I.G. filed a reply brief (I.G. Reply) on September 24, 2012. Petitioner did not object to the I.G.'s exhibits, and I admit into evidence I.G. Exs. 1-8. The I.G. objected to Petitioner's proposed exhibits arguing that they are irrelevant and inadmissible because they are offered in support of an impermissible collateral attack on Petitioner's underlying convictions. I.G. Reply at 3. P. Ex. 1 is Petitioner's explanation of her decision to plead guilty to the underlying felony charges. P. Ex. 2 is Petitioner's guilty plea. P. Ex. 3 is an Ohio state court order terminating Petitioner's probation accompanied by a report from Petitioner's parole agent. P. Ex. 4 is Petitioner's curriculum vitae. P. Ex. 5 is a letter from Petitioner to the State court judge. P. Ex. 6 is a statement from Petitioner describing the sequence of events leading to her convictions. P. Ex. 7 is an index of exhibits. As discussed below, I do reject Petitioner's collateral attacks; however, I find all of these exhibits probative of the facts that Petitioner was a pharmacist convicted of felony charges involving fraud and controlled substances, and I admit them to the record.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and, if so, to describe the testimony the party wishes to present, the names of the witnesses it would call, and a summary of each witnesses' proposed testimony. Both parties indicated that they did not believe an in-person hearing was necessary to decide this case.

II. Issues

The issues in this case are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to sections 1128(a)(3) and 1128(a)(4) of the Act; and

2. Whether the length of the exclusion is unreasonable.

III. Findings of Fact, Conclusions of Law, and Analysis

A. Petitioner's exclusion is mandated by section 1128(a)(3) of the Act because Petitioner was convicted of felony offenses related to fraudulently obtaining prescription drugs.

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. 42 U.S.C. § 1320a-7(a)(3). The terms of section 1128(a)(3) are restated in the regulatory language at 42 C.F.R. § 1001.101(c).

In her brief, Petitioner denies that she was convicted of any felony offenses.¹ Petitioner argues that she “was charged, not convicted.” She acknowledges that she pled guilty but states that she did so “only because [she] was ill-advised that [her] life would return to normal after 2 years. No Contest was not an option.” P. Br. at 1.

For exclusion purposes, an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld. Act §1128(i) (42 U.S.C. § 1320a-7(i)).

Court records conclusively establish that Petitioner was “convicted,” as set out by subsections 1128(i)(1) and (3), of four felony offenses that justify her exclusion.

Specifically, on December 13, 2010, in the Court of Common Pleas, Stark County, Ohio, Petitioner pled guilty to two counts of Illegal Processing of Drug Documents, felonies of the fifth degree in violation of OHIO REV. CODE ANN. § 2925.23(A)(F)(2), and two counts of Deception to Obtain a Dangerous Drug, felonies of the fifth degree in violation of OHIO REV. CODE ANN. § 2925.22(A)(B)(3)(a). I.G. Exs. 5, 6; *see* I.G. Exs. 2-4. The

¹ To the contrary, in her hearing request Petitioner appears to admit that she was convicted of a felony stating, “Being given a felony conviction for not having any way of guaranteeing what another individual records in their phone records is already too harsh.”

Court accepted Petitioner's guilty plea and entered judgment of conviction against her on December 17, 2010. I.G. Ex. 5. The court's entry of judgment explicitly states, "The Court hereby convicts [Petitioner] of the criminal offenses to which she had pled guilty." I.G. Ex. 5, at 2.

On January 25, 2011, the court sentenced Petitioner to three years of community control, subject to the general supervision and control of the court, and 100 hours of community service. The court also ordered her to pay court costs and monitoring fees, complete drug and alcohol assessments, comply with the Board of Pharmacy, and notify her employers of her conviction. I.G. Ex. 6, at 3-5.

I find further that the conduct for which Petitioner was convicted related to fraud in connection with the delivery of a health care item or service after 1996. The Grand Jury Indictment charged Petitioner with two counts of knowingly making false statements in a prescription, order, report, or record for the drugs Hydrocodone/APAP and Nexium, and two counts of procuring by deception, "the administration of, a prescription for, or the dispensing of" Hydrocodone/APAP and Nexium, or "possess[ing] an uncompleted preprinted prescription blank used for writing a prescription for a dangerous drug." I.G. Ex. 2. The Bill of Information described Petitioner's criminal conduct as having occurred during the time period from August 20, 2008 to December 11, 2009. I.G. Ex. 4.

According to an Order of the Ohio State Board of Pharmacy, dated May 5, 2011, the relevant criminal acts included the following: on or about August 20, 2008, Petitioner added five refills to a prescription for Hydrocodone/APAP when two refills had been authorized by a prescriber; on or about September 29, 2008, December 31, 2008, July 15, 2009, November 11, 2009, and April 22, 2010, Petitioner created telephone prescriptions for Hydrocodone/APAP without authorization from a prescriber; and on or about March 23, 2009 and December 11, 2009, Petitioner created a telephone prescription for Nexium without authorization from a prescriber.² I.G. Ex. 7, at 2-3.

The I.G. has demonstrated that all elements required for exclusion under Section 1128(a)(3) of the Act are satisfied. Petitioner pled guilty to felony convictions that had a clear common-sense connection to fraudulently obtaining a health care item after August 21, 1996.

² The Ohio State Board of Pharmacy suspended Petitioner's license to practice pharmacy retroactively to February 4, 2011, and it placed her on probation for three years. I.G. Ex. 7.

B. Petitioner's exclusion is mandated by section 1128(a)(4) of the Act because Petitioner was convicted of felony offenses related to the unlawful distribution of a controlled substance.

The I.G. is required to exclude from participation in Medicare, Medicaid, and all federal health care programs any individual or entity: (1) convicted of a felony criminal offense under federal or state law; (2) where the offense occurred after August 21, 1996; and (3) the criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Act § 1128(a)(4) (42 U.S.C. § 1320a-7(a)(4)). The terms of section 1128(a)(4) are restated somewhat more broadly in regulatory language at 42 C.F.R. § 1001.101(d).

As discussed above, Petitioner was a pharmacist who was convicted pursuant to her guilty plea of two counts of Illegal Processing of Drug Documents, felonies of the fifth degree in violation of OHIO REV. CODE ANN. § 2925.23(A)(F)(2), and two counts of Deception to Obtain a Dangerous Drug, felonies of the fifth degree in violation of OHIO REV. CODE ANN. § 2925.22(A)(B)(3)(a). Specifically, during a period of time from August 2008 through April 2010, Petitioner created false prescriptions for a controlled substance, Hydrocodone/APAP, and she used deception to obtain them. The Schedules of Controlled Substances in the Code of Federal Regulations list Hydrocodone as a controlled substance. 21 C.F.R. § 1308.12. Thus, there can be no dispute that the offenses for which Petitioner was convicted clearly had a nexus to the unlawful prescription of a controlled substance. I.G. Exs. 2-6. Accordingly, I conclude that there is also a basis to exclude Petitioner pursuant to section 1128(a)(4) of the Act.

C. I am unable to consider collateral attacks to predicate convictions.

Petitioner claims, when pleading guilty to the predicate offenses, she was not fully advised of the consequences and did not want to incur the legal expenses of going to trial when she understood that her “life would return to normal after 2 years.” P. Br. at 1; P. Ex. 1. Further, she maintains her innocence and explains that a doctor did authorize the prescriptions at issue in her felony convictions. P. Ex. 1.

Petitioner's arguments amount to a collateral attack on her predicate convictions, and they are not reviewable in the instant proceeding. “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). The Departmental Appeals Board (Board) has repeatedly affirmed this categorical preclusion. *See, e.g., Lyle Kai, R.Ph.*, DAB No. 1979, at 8 (2005) (“Excluding individuals based on criminal convictions ‘provides protection for federally funded programs and their beneficiaries and recipients,

without expending program resources to duplicate existing criminal processes.” (internal cite omitted)).

D. Petitioner’s exclusion for five years is not unreasonable as a matter of law.

Five years is the minimum authorized period for a mandatory exclusion pursuant to Section 1128(a). Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). I have found there is a basis for Petitioner’s exclusion pursuant to sections 1128(a)(3) and 1128(a)(4) of the Act. Accordingly, the minimum period of exclusion is five years, and, as a matter of law, that period is not unreasonable.

Petitioner requests that her exclusion “be retroactive to April 2010 when [her] employment ceased, for a duration of 2½ years.” P. Ex. 1, at 2. However, by law, an exclusion becomes effective 20 days from the date of the I.G.’s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b). I have no discretion to change the effective date of Petitioner’s exclusion. 42 C.F.R. § 1005.4(c)(1); *see Randall Dean Hopp*, DAB No. 2166, at 2-4 (2008); *Thomas Edward Musial, R.Ph.*, DAB No. 1991 (2005).

IV. Conclusion

For the foregoing reasons, I sustain the I.G.’s determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for five years pursuant to sections 1128(a)(3) and 1128(a)(4) of the Act.

/s/
Joseph Grow
Administrative Law Judge