Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sarah M. Hazel,
(OI File No. H-13-0606-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-178

Decision No. CR3212

Date: May 1, 2014

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Sarah M. Hazel, from participating in Medicare, Medicaid, and other federal health care programs for a period of five years. I find that the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(3) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(3)) and that five years is the minimum mandatory period of exclusion.

I. Background

Petitioner is a practical nurse who pleaded guilty to a felony charge related to knowingly obtaining a controlled substance in a manner other than as authorized in the Controlled Substance Act. In a letter dated September 30, 2013, the I.G. notified Petitioner that he was excluding her from participation in Medicare, Medicaid, and other federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(3) of the Act. The basis cited for Petitioner's exclusion was her felony conviction in the Second Judicial Circuit Court, Gallatin County, Illinois, of a criminal offense 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. Acting *pro*

se, Petitioner sought review of the I.G.'s determination in a request for hearing (RFH) dated October 28, 2013. On December 11, 2013, I convened a telephonic prehearing conference, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence, dated December 13, 2013.

The I.G. filed a brief (I.G. Br.) on January 10, 2014, with I.G. exhibits (I.G. Exs.) 1 through 8. Petitioner did not object to the I.G.'s exhibits, so I admit them into evidence. Petitioner filed a response (P. Br.) on February 26, 2014, with Petitioner exhibits (P. Exs.) 1 through 8. The I.G. did not object to Petitioner's exhibits, so I admit them into evidence. The I.G. filed a reply brief (I.G. Reply) on March 7, 2014.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary to decide this case. Both parties indicated that an in-person hearing was not necessary. Accordingly, I decide this based on the written record.

II. Issues

The issues in this case are:

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

2. Whether the length of the exclusion is unreasonable.

III. Findings of Fact and Conclusions of Law

A. Petitioner's exclusion is mandated by section 1128(a)(3) of the Act.

Section 1128(a)(3) of the Act, entitled "[f]elony conviction relating to health care fraud," requires, in pertinent part, the exclusion from participation in any federal health care program (as defined in section 1128B(f)) of any individual who "has been convicted for an offense, which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, in connection with the delivery of a health care item or service . . . consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." The regulation implementing section 1128(a)(3) is found at 42 C.F.R. §1001.101(c)(1).

1. Petitioner has been convicted of a felony offense because a court accepted her guilty plea and she entered into a first offender program where judgment of conviction was withheld.

For exclusion purposes, an individual is considered 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)).

In her brief, Petitioner acknowledges that she pleaded guilty but states that upon entering her guilty plea, the prosecutor advised her that by "taking the 410 probation and abiding by all the terms and conditions that [she] was not actually convicted of a felony . . . ." Petitioner argues that the prosecutor advised that after "2 years . . . everything would be dismissed . . . ." P. Br. at 2.

Even if Petitioner's actions may not constitute a conviction under state authority, court records conclusively establish that Petitioner was "convicted" under the authority of subsections 1128(i)(3) and (4) of a felony offense that justifies her exclusion. Specifically, on February 11, 2013, in the Circuit Court of the Second Judicial Circuit, Gallatin County, Illinois, Petitioner pleaded guilty to one count of Unlawful Possession of Controlled Substance, a felony of the fourth degree in violation of 720 ILL. COMP. STAT. § 570/402(c). I.G. Exs. 6-8. Without entering judgment, the court accepted Petitioner's guilty plea and imposed a sentence of probation as defined in section 410 of the Illinois Controlled Substances Act. I.G. Exs. 6-8; *see* 720 ILL. COMP. STAT. § 570/410(a). The court also ordered Petitioner to pay miscellaneous fines, assessments, and contributions, perform 30 hours of community service, and submit to periodic drug screening. I.G. Ex. 8.

Petitioner clearly pleaded guilty to one felony count of Unlawful Possession of Controlled Substance, the court accepted that plea, and Petitioner entered into section 410 probation, a first offender program where judgment of conviction is withheld. I.G. Exs. 6-8. For purposes of an exclusion under section 1128(a)(3), these actions satisfy the element requiring a conviction of a felony offense as set out by subsections 1128(i)(3) and (4) of the Act.

2. Petitioner's conviction related to theft of a controlled substance.

An 1128(a)(3) exclusion must also involve an offense related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct. I find here that Petitioner's conviction related to the theft of prescription drugs. Specifically, count I of the information, to which Petitioner pleaded, charged her with "committ[ing]

the offense of UNLAWFUL POSSESSION OF CONTROLLED SUBSTANCE, a Class 4 Felony, in that [Petitioner] knowingly had in her possession pills containing Hydrocodone, . . . other than as authorized in the Controlled Substances [A]ct . . . ." I.G. Exs. 6-8. Further, prior to the filing of any criminal charges against her, Petitioner entered into a "Consent Order" with the State of Illinois Department of Financial and Professional Regulation. In that Order, Petitioner admitted that she "diverted" from her employer, Ridgeway Rehabilitation and Nursing Center (Ridgeway), medications to give to her brother for his use. I.G. Ex. 4 at 1.

By her own admission, Petitioner also acknowledged the nature and circumstances of her criminal offense. I.G. Ex. 7. On April 13, 2012, Petitioner provided a "Voluntary Statement" to the Illinois Police Department and admitted to stealing Lortab -- a prescription medication containing Hydrocodone -- from Ridgeway. I.G. Br. at 2; I.G. Ex. 3. Therefore I find Petitioner's felony conviction was related to the theft of a controlled substance.

3. Petitioner's felonious conduct occurred in connection with the delivery of a health care item or service after August 21, 1996.

I find further that the conduct for which Petitioner was convicted occurred in connection with the delivery of a health care item or service. This is undisputed, and the Board has previously held that "theft of [a] drug while under the guise of performing . . . professional responsibilities is clearly the requisite common sense connection to health care delivery that section 1128**(**a**)(**3) requires." *Erik D. DeSimone, R.Ph.*, DAB No. 1932, at 3 (2004).

Petitioner also does not dispute that that her conviction occurred after August 21, 1996, the enactment date of the Health Insurance Portability and Accountability Act of 1996. In her Voluntary Statement to the Illinois State Police, Petitioner admitted to stealing Hydrocodone from Ridgeway in November 2011. I.G. Ex. 3. Further, an information described Petitioner's criminal conduct as having occurred "on or about November 1, 2011." I.G. Ex. 6.

B. I am unable to consider Petitioner's collateral attacks to her predicate conviction or her equitable arguments.

Petitioner claims that she entered into a plea agreement after the prosecutor advised her that "this was the best thing to do" and "that it would not affect [her] working status in the healthcare field . . . ." RFH. Further, she observes that the prosecutor advised her she "should not have any exclusion's [sic] because [she] was not convicted of a felony" and because judgment was withheld. RFH.

Petitioner's arguments amount to a collateral attack on her predicate conviction, 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 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)).

Petitioner also asserts that the equities of her situation argue against a mandatory five-year exclusion. In her brief, Petitioner argues that she cooperated with law enforcement's investigation and attempts to apprehend her brother. P. Br. at 3. Petitioner further asserts that she informed her current employer of the suspension of her license, her conviction, and the I.G.'s exclusion action. P. Br. at 3. She describes her love for being a nurse and included three letters from professional colleagues who have lauded her honesty in dealing with the consequences of her actions. P. Br. at 3; I.G. Exs. 5-7. However, the factors I may consider in this proceeding are very limited, and I must uphold the mandatory exclusion because I find Petitioner was convicted of a felony involving the theft of a controlled substance. An ALJ may not decrease a mandatory minimum term of exclusion based on principles of fairness or the consequences of the sanction on an individual's professional career. *See Salvacion Lee, M.D.*, DAB No. 1850 (2002)

C. Petitioner's five-year exclusion is not unreasonable as a matter of law.

Petitioner challenges her exclusion for five years as excessive because she was placed on probation for a term of only two years. P. Br. at 3. Petitioner further asserts that upon fulfilling the conditions of probation, the court will discharge the predicate offense without judgment of conviction. P. Br. at 3. When an individual is convicted of a criminal offense as defined by section 1128(a)(3) of the Act, however, a minimum exclusion for five years is mandatory. *See* 42 U.S.C. § 1320(a)-7(c)(3)(B); 42 C.F.R. § 1001.102(a). Accordingly, the minimum five year exclusion period, as a matter of law, is not unreasonable.

IV. Conclusion

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

/s/
Joseph Grow
Administrative Law Judge